

103

IMPACTS OF TRADE AGREEMENTS ON U.S. ENVIRONMENTAL PROTECTION AND NATURAL RESOURCE CONSERVATION EFFORTS

Y 4. M 53:103-5

Impacts of Trade Agreements on U.S.... **RING**

...RE THE
SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

ENVIRONMENTAL IMPACTS OF A FREE TRADE
AGREEMENT

MARCH 10, 1993

Serial No. 103-5

Printed for the use of the Committee on Merchant Marine and Fisheries



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IMPACTS OF TRADE AGREEMENTS ON U.S. ENVIRONMENTAL PROTECTION AND NATURAL RESOURCE CONSERVATION EFFORTS

WEDNESDAY, MARCH 10, 1993

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The subcommittee met, pursuant to call, at 10:22 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the subcommittee] presiding.

Present: Representative Studds, Hochbrueckner, Pallone, Unsoeld, Reed, Furse, Hamburg, Lambert, Eshoo, Ortiz, Gilchrest, Castle.

Staff Present: Jeffrey Pike, Will Stelle, Sue Waldron, Gina DeFerrari, Karen Steuer, Lesli Gray, Leigh Clayton, Joan Bondareff, Robert Wharton, Cyndi Wilkinson, Laurel Bryant, Jayneanne Rex, Tom Melius, Jill Brady, Harry Burroughs, Eunice Groark, Bill Wright.

STATEMENT OF HON. GERRY STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS

Mr. STUDDS. The subcommittee will come to order. The Chair apologizes profusely to his colleagues and to the witnesses and to those here. Nothing short of a breakfast meeting at the White House would have kept me, and that is what it was, and I do apologize. And you should all feel comforted that the spotted owl controversy is well on its way to resolution. I particularly apologize to the witnesses who have been kept waiting.

Let me say there are a lot of folks here. If there is anyone—particularly anyone who needs to write—without a seat—you are perfectly welcome to come and fill in on this lower dais here. That will relieve some of the pressure there. You will not be accused of being a member of Congress so please feel free to come on in. Don't be frightened. Most of these people up here are really quite nice.

In 1984, when this committee passed an amendment to the Marine Mammal Protection Act establishing an embargo provision for dolphin-unsafe tuna, we had no idea that it would become the catalyst for an international debate on the impacts of free trade agreements on U.S. conservation and environmental protection efforts. It is largely because of the Marine Mammal Protection Act's embargo provisions that we are all here today.

We live in a world growing steadily smaller, where an action in one hemisphere has the potential to reverberate almost immediately in another. The American economy is now a global one, and American jobs are created or destroyed by the relative success or failure of our export markets. At the same time, access to a healthy U.S. consumer market has the ability to make or break a foreign industry's future. The U.S. economy increasingly reflects the growing influence of international free trade principles, that, ideally, those who produce the most products at the cheapest prices are the winners.

But the old saying of "caveat emptor" applies to free trade as well. The maquiladora area on the U.S.-Mexican border is a sobering example of trade principles gone awry, with American companies moving south to take advantage of cheap labor and lax enforcement of environmental regulations. There are also major sovereignty issues to be considered, given the circumstances of Mexico's challenge to our own Marine Mammal Protection Act. Finally, of paramount concern to all of us should be the process of democracy itself, and the fact that thus far trade negotiations and dispute settlements have taken place in secret, behind closed doors.

Today's subject is quite possibly the most arcane and impenetrable of any that I can remember before this committee in a long time. Let me try a couple of examples to illustrate in a very real sense why we are here. Should the United States have the right to insist that automobiles sold in this country meet certain fuel efficiency standards or emission standards? The answer is yes. But might these standards be argued to constitute an illegal restraint on trade and violation of these trade agreements? The answer is also yes.

Should the United States have the right to insist that agricultural products meet certain minimum public health standards, and that their production meets certain minimum environmental standards? The answer, of course, is yes. But might these standards be challenged as an illegal restraint on trade on those products not meeting similar standards? That answer is also yes.

Should we have the right to insist that our domestic markets not be used for causing the depletion of limited natural resources elsewhere, whether they be resources of the international commons or anywhere else? The answer clearly is yes. But might these restrictions be challenged as illegal under these trade agreements? The answer, again, is darn right.

In short, when have the interests of expanding trade trumped all other social or environmental policies? It is a fact that both the General Agreement and the NAFTA purport to elevate trade objectives to precisely this status, and that, in my view, makes no sense at all.

Those of us who have spent most of our legislative careers trying to protect the environment and natural resources may well have been asleep at the wheel for far too long, but as of this moment, we are no longer asleep. Something needs to give. One hundred and fifty years ago while giving a speech on import duties before the English House of Lords, Benjamin Disraeli warned that free trade, in and of itself, is not a principle but an expedient, a means to an end. In today's world, that end must not consist solely of enriching

the stockholders of Fortune 500 companies as quickly as possible. We must also ensure that global free trade does not further stress this fragile planet and its limited resources.

Until recently, considering the environmental impacts of a trade agreement was as alien to trade negotiators as protecting wetlands was to the late, unlamented Council on Competitiveness. Fortunately, that situation is changing. Trade negotiators are learning about sustainable yield and biodiversity. Environmentalists are talking about import surges and snap-back tariffs. In short, we are entering a brave new world of trade negotiations, and we are entering it none too soon. Laws important to this committee are at stake: the Magnuson Fisheries Conservation and Management Act, the Marine Mammal Protection Act, the Fishermen's Protective Act, the Wild Bird Conservation Act, and the High Seas Driftnet Fisheries Enforcement Act all contain trade restrictions.

The challenge before us today is to determine how best to mesh free trade with other domestic policy programs including environmental protection and wildlife conservation. A number of the laws passed by this committee have taken the same approach supported by conservation and consumer action groups, that the leverage of potential import sanctions encourages protection of natural resources both domestically and abroad.

It is admittedly not the best approach in an ideal world. But this, as many people may have noticed, is not an ideal world. If it were, we would not have hundreds of species on the verge of extinction and hundreds more already gone. We would not be faced with polluted coastal environments and destroyed riversheds, and we would not need smokestack scrubbers or reforestation programs.

The new Administration's announcement of its intention to begin negotiations on an environmental side agreement to the NAFTA makes this hearing timely and extremely important to this committee. It is the objective of this subcommittee to assist the Administration in developing the terms of an agreement to accompany the NAFTA that will properly incorporate issues of environmental quality and natural resource conservation into that agreement and other trade initiatives. It is an enormous challenge that is long overdue. I look forward very much to today's testimony.

Mr. STUDDS. Are there additional opening statements? The gentleman from Delaware.

Mr. CASTLE. Thank you very much, Mr. Chairman, and good morning. I would like to make an opening statement. Before I do though, I would ask for unanimous consent that opening statements which I have here by the Honorable Jack Fields and the Honorable H. James Saxton be entered into the record.

Mr. STUDDS. Without objection.

[Statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, I am pleased that the Subcommittee is holding a hearing today on the impact of trade agreements on environmental protection and natural resources conservation.

I would like to welcome our distinguished witnesses, especially Dr. Khosrow Fatemi, Dean of the Graduate School of International Trade and Business Administration at Laredo State University. Dr. Fatemi is familiar with the North American

Free Trade Agreement and I am sure will provide us with some valuable insights into the impacts of the Agreement.

As a Representative from Texas, the largest U.S. exporter to Mexico and sixth largest U.S. exporter to Canada, the NAFTA will have a considerable impact on my home State. In 1991 alone, Texas exported \$19.7 billion worth of goods to Canada and Mexico, supporting 185,000 jobs. As a whole, the U.S. has seen its exports to Mexico almost double since 1988, from \$20.6 billion to \$40.6 billion in 1992. It is critical that, as side protocols are contemplated, we do not forget the economic benefits that are achievable.

I understand and support the need to address environmental issues in trade agreements. I believe that NAFTA has done a good job looking at the environmental impacts of proposed economic development. Indeed, one of the goals in the NAFTA is to strengthen development and enforcement of environmental laws and regulations. NAFTA allows the U.S. to continue to prohibit goods that do not meet U.S. standards; allows parties (including States and Cities) to enact tougher standards; encourages strengthening and harmonizing environmental and health protection standards; and preserves the right to enforce international treaties protecting endangered species and lessening the use of ozone depleting chemicals.

In spite of what the NAFTA already addresses, there are many who feel additional environmental protections are needed, not only in the NAFTA, but also in General Agreement on Tariffs and Trade (GATT) negotiations. While I believe it is important that we review these concerns, we need to also recognize that progress is being made. In 1991, Mexico spent 18 times more on environmental concerns than in 1988. They are enforcing the strong environmental laws that they already have on the books. Whatever changes we make in trade agreements currently under consideration, it is important to recognize and encourage progress, not burden the process with disincentives to trade.

I look forward to hearing the comments of our witnesses on the impacts of the NAFTA and GATT Agreements on the environment and their suggestions for improvements. I appreciate the Chairman's interest in an issue that is so critical to the U.S., and to many of my constituents. Thank you.

[Statement of Mr. Saxton follows:]

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

I want to thank the Chairman for taking initiative on this matter. As most of us have known, and others are beginning to understand, the environment and the economy are not mutually exclusive. Rather, they are interdependent. Nowhere else will this interdependency become more evident than in the matter of global free trade.

Like many of us here today, I am particularly concerned with the matter of domestic sovereignty. Our domestic industries—be they manufacturers of goods or harvesters of fish—have been forced through the years to minimize their impact on the environment, take the lead in developing sound technologies, and adopt methods of conservation and sustainable stewardship. Such technologies will be critical components of our export industries in the years ahead.

However, as the domestic and international demand for expanding free trade increases, we must take care not to place our industries at a disadvantage. Protecting our domestic players while insisting on strong conservation measures and stewardship as a requirement for doing business is one of the most important tasks facing this country and the future global markets.

I look forward to working with the Chairman on this matter and welcome our witnesses here today.

Thank you, Mr. Chairman.

[Statement of Mr. Ortiz follows:]

STATEMENT OF HON. SOLOMON P. ORTIZ, A U.S. REPRESENTATIVE FROM TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON OCEANOGRAPHY, GULF OF MEXICO, AND THE OUTER CONTINENTAL SHELF

I want to thank all you for coming today to appear before the Subcommittee to address the issue of how the negotiation of trade pacts with other nations may impact U.S. environmental protection and natural resource conservation efforts.

I have read through a number of your prepared testimonies, and I understand the concern that a number of you have raised that we may be hurting our environmental protection and resource conservation efforts in the name of trade expansion.

However, there is another side to this matter.

I specifically want to talk about our government's ongoing negotiation of a free trade agreement with Mexico.

As a Member of Congress from a Congressional District which borders Mexico, I know firsthand about the tremendous positive effects that a trade agreement will have in terms of economic stability and growth and job creation. I believe that the future economic success of our nation hinges on the expansion of an export-based economy, and in particular the broadening of trade relations with Mexico.

But leaving economics aside, I also believe that a free trade agreement with Mexico will bring numerous environmental and conservation benefits.

I live on the border. I know that there are some environmental problems and health concerns. I know that Mexico has historically not been as stringent in the enforcement of its environmental laws as we have of ours.

However, I also know that if we run and hide from this opportunity to expand our relations with Mexico, we will only be worsening the problem, not solving it.

The free trade agreement has not created these environmental problems. In fact, its negotiation has focused attention and funding on these concerns for the first time.

In the last two years both Mexico and the U.S. have made tremendous strides to address the problems of the border region and to ensure the protection of the environment.

For example, Mexico has increased its environmental budget by 42 percent over the last year. It has increased the number of environmental inspectors by 400% since 1989, and has committed \$460 million to fulfill the objectives of the Integrated Border Environmental Plan.

Likewise, just this past year, the other Border Members and I were able to obtain \$75 million for water and waste water projects along the Southwest border. Congress has also mandated that we give high priority to border community health centers, to help address border health concerns.

I can assure this Committee that without the prospect of a free trade agreement little to none of this would have occurred in either country.

I believe those of you here who feel strongest about the environment should be the ones who should embrace this agreement the most.

By almost every estimate, NAFTA will have a dynamic positive effect on the per capita GNP, economic stability, and financial strength of Mexico.

It is this growth in prosperity that will allow the Mexican government and its people the financial ability to address its environmental and resource conservation needs.

I should not need to remind you that the number of important environmental programs administered by our government are only possible due to the financial resources of this government and its people. We have the ability to expend time and money on environmental protection because of our economic stability.

If we choose to turn our backs on Mexico, to forego the expansion of our trade and cultural relations in the name of environmental protection, we will just condemn Mexico to an economic servitude that can lead only to renewed environmental degradation.

I am not saying that increased trade and economic and industrial development will not create its share of environmental challenges.

However, I just want to make sure that you understand that NAFTA will be a powerful environmental tool in itself, once it is implemented; one that will provide Mexico with the resources to achieve a balance of sustainable development and environmental protection, and will provide our government and our nation with an enhanced participatory role in this process.

By increasing the bonds of our two nations, we stand to benefit not only economically, but also environmentally.

I again thank each of you for coming today, and I look forward to your testimonies.

STATEMENT OF HON. MICHAEL CASTLE, A U.S. REPRESENTATIVE FROM DELAWARE

Mr. CASTLE. Thus far, much of the debate over the North American Free Trade Agreement, NAFTA, has centered on whether it

will create or cost American jobs. So I look forward to testimony from members of this distinguished panel to examine the environmental impact of NAFTA and other trade agreements, particularly on U.S. environmental protection and conservation efforts.

As Congress prepares to vote on NAFTA, there are several provisions that remain unclear. While I do not believe the U.S. Government should impose excessive regulations on businesses that may take advantage of this trade agreement, NAFTA's impact on wildlife protection, international agreements, and dispute settlements needs to be resolved before Congress votes on the trade pact. Furthermore, Congress should carefully examine the proposed creation of a trinational North American Commission on the Environment and the role it would play in monitoring NAFTA-related issues.

The United States has some of the very best environmental laws in the world, and while the main objective of the NAFTA may be to bring down trade barriers, we must ensure we do not trample our environmental laws in the process. Thank you, Mr. Chairman.

Mr. STUDDS. Thank you. Are there additional opening statements on this side? The gentlewoman from Oregon.

**STATEMENT OF HON. ELIZABETH FURSE, A U.S.
REPRESENTATIVE FROM OREGON**

Ms. FURSE. Thank you, Mr. Chairman. Thank you for giving us this opportunity to explore the expanding debate on the relationship between U.S. environmental laws and international free trade agreements.

In the past decade, there has been a growing environmental awareness. We are at a point where the leaders of this country recognize the need for environmental protection laws, and momentum is gathering for the U.S. adoption of new environmental laws. It is vital that those in the trade arena keep pace with state and Federal efforts toward better stewardship of our global resources and environment. Several international agreements to enhance relationships with other nations and the economic growth of all signatories has been negotiated with environmental blinders.

While I agree with the need for free trade, that trade must be fair. I need to support an agreement that does not violate our environmental and health and safety laws. The U.S. has worked hard to protect the health and safety of our labor force and of the general public. It is not free trade when U.S. goods must play by a stricter and more costly set of rules when competing with foreign goods which are produced with little or none of the same environmental or safety requirements.

I believe that the environmental side agreements to be negotiated are necessary, and I am very interested to learn more about what we in this committee can do to enhance free and fair trade plus effective U.S. environmental law. Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentlewoman. Are there additional statements? The gentleman from California.

STATEMENT OF HON. DAN HAMBURG, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. HAMBURG. Thank you, Mr. Chairman, and colleagues. I come to today's hearing with serious reservations about NAFTA. I am extremely concerned that NAFTA will simply create further inducements for our large corporations to move to the source of cheaper labor and put more Americans out of work. Even without tariff reductions, relocation of manufacturing facilities is increasingly common, both because of the prospect of cheaper labor and because of less demanding environmental regulation.

In my district in northern California, two large pulp and paper mills have operated for decades virtually side by side. During the last five years, one has made substantial investments necessary to comply with air and water requirements. The other closed last week. Hundreds of workers lost their jobs. The employer has announced plans to relocate in Chile where environmental regulations will not require the significant investment necessary to meet our environmental standards.

Not only have hundreds of jobs been lost, but the global environment pays a price. The global environment will pay an even higher price unless enforcement of common environmental standards is an integral part of NAFTA's tariff reduction agreements. The toxic discharges from border town maquiladora plants speak for themselves. It is happening already. We don't need to speculate about likely results. NAFTA will create incentives for an ever-broadening border deeper into Mexico with an ever-broadening zone of environmental degradation.

The environmental cost is too high. Any treaty to reduce tariffs must include agreements to establish and enforce environmental and working place regulations. The cost of doing business in a tariff-free environment must include the cost of reasonable wages, decent workplace conditions, and environmentally responsible processes. Unless the price is paid by multinational corporations who relocate to profit from lower standards, then the price will be paid by workers and paid by the environment.

Mr. Chairman, thank you for convening this hearing. Only by addressing this multinational issue early can we hope to preserve the significant progress we have made nationally in cleaning up our air and water. Thank you.

Mr. STUDDS. Thank you. Are there additional opening statements? If not, we will proceed with our witnesses. Again, let me apologize to you and to those who are waiting to come after you for the delay. We are asking everyone, as I trust you have been advised, to confine their oral testimony to no more than five minutes. All written testimony will appear in its entirety in the record.

We apologize for the necessity of that, but, as you can imagine, given the number of people who should be heard and wish to be heard and will be heard, we could not function otherwise. We will also, if it is any consolation to the witnesses, apply the same barbaric rule of constraint to ourselves in the question period. So when your yellow light goes on, you have one minute left. And when your red light goes on, you have concluded. First, we welcome Ambassador Rufus Yerxa, the Deputy United States Trade

Representative, and, Ambassador Yerxa, I understand you have made the transition, and we congratulate you. Welcome.

Ambassador YERXA. Thank you.

STATEMENT OF RUFUS YERXA, DEPUTY U.S. TRADE REPRESENTATIVE, OFFICE OF THE U.S. TRADE REPRESENTATIVE; ACCOMPANIED BY CHIP ROH, ASSISTANT U.S. TRADE REPRESENTATIVE FOR NORTH AMERICAN AFFAIRS AND CARMEN SURO-BREDIE, U.S. TRADE REPRESENTATIVE FOR THE ENVIRONMENT

STATEMENT OF RUFUS YERXA

Ambassador YERXA. Mr. Chairman, let me thank you and the members of the committee on behalf of Ambassador Kantor and my office for this very timely hearing. I hope it will be the beginning of a productive dialog on how we might proceed in this very, very sensitive area. I am accompanied today by Mr. Chip Roh, who is our Assistant U.S. Trade Representative for North American Affairs, and Carmen Suro-Bredie, who is our Assistant USTR for the Environment.

Let me briefly, Mr. Chairman, begin by taking a point from President Clinton's speech at American University in which he talked about the imperative of meeting the challenge of a global economy. He stressed the importance of competing in a global economy to the future of all Americans and the need to adopt policies and laws which would enable us to compete effectively and would open world markets to U.S. products. But he also stressed the importance of ensuring that as we promote global growth, we do it in a way which is sustainable and which helps to promote and ensure the very important balance of the earth's environment, of the conservation of its resources, and that we not adopt policies and programs which would lead to a contrary result.

So I think in this statement the President was indicating a profound sensitivity to the concerns which you, Mr. Chairman, have raised in your opening remarks, and I think you put it very aptly when you said the challenge before us is to determine how best to mesh free trade with other domestic policy programs including environmental protection and wildlife conservation.

So I want to begin by talking briefly about our pending negotiations with Mexico and Canada on a side agreement on the environment, and let me start by saying that the President has indicated that he would support the NAFTA as an element in our overall economic policy, as an agreement which can help to promote an increase in U.S. exports and ultimately greater economic gains, both for the United States and Mexico.

However, he stressed that to reach these goals, the NAFTA must be accompanied by right domestic policies and supplemented by additional domestic actions and agreements to address concerns regarding the environment and labor. And on both the domestic and international fronts, we intend to address environmental and labor concerns in a concrete and comprehensive fashion. Doing so does not mean reopening the NAFTA but rather supplementing its provisions so that his promise can be realized.

Next week, Mr. Chairman, on March 17 and 18, I will be leading the first round of negotiations aimed at reaching a supplemental agreement on the environment. And our team will include officials from the Environmental Protection Agency, the Department of the Interior, the Department of Commerce, and the Department of State. And, of course, we will be meeting with our counterparts from both trade and environment agencies in Mexico and Canada.

Let me assure you that we will pursue these negotiations vigorously but that we will not forsake substance for speed, nor let an artificial timetable drive our efforts. As the President and Ambassador Kantor have said, we will not ask you to vote on NAFTA-implementing legislation until these negotiations result in a solid agreement on both environment and labor questions.

We want the environmental agreement to have mechanisms and provisions to help raise standards where they are deficient, to strengthen national enforcement of national laws, to improve the U.S.-Mexico border environment, and to ensure that the NAFTA promotes sustainable development in all three countries. I am optimistic that these goals can be achieved, and I might point out, Mr. Chairman, that Mexico's laws on both environmental and labor matters and their standards on the books are quite impressive.

And President Salinas has repeatedly recognized the need for strengthening enforcement. We believe that the real problem here is one of enforcement of the laws rather than the standards themselves. But his government has shown a commitment to increasing the level of resources and manpower dedicated to environmental protection.

Mr. Chairman, I see the environmental agreement covering three basic areas: improved cooperation on environmental safeguards including technical assistance and data sharing; improving enforcement of standards and national laws, both through the administrative and judicial processes of each country and new environmental commissions which will provide independent review of measures to enforce national laws; and encouraging a positive impact of the NAFTA on North America's environment.

Let me just close there, Mr. Chairman. You have my full statement which, as you said, will be a part of the record, and your colleagues can read my remaining comments. Obviously, there are a number of issues this committee is concerned with that go beyond the supplemental agreement on the environment that we are about to work out, and I am prepared to address your questions and concerns on these issues.

[The prepared statement of Ambassador Yerxa may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, Mr. Ambassador. Next, an old friend of this committee—excuse me—that doesn't sound right at all—a dear friend of this committee, Director John Turner of the Fish and Wildlife Service. Mr. Turner, welcome.

STATEMENT OF JOHN TURNER, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE; ACCOMPANIED BY HERBERT RAFAEL, SERVICES INTERNATIONAL OFFICE

STATEMENT OF JOHN TURNER

Mr. TURNER. Good morning, Mr. Chairman, members of the committee. It is certainly a pleasure to appear here this morning on behalf of Secretary Babbitt and the Department of Interior to discuss environmental aspects of the North American Free Trade Agreement especially as they relate and impact the Department of Interior and its authorities and shared resources. I am pleased to be accompanied this morning by Herb Rafael of the Service's International Office. Herb has considerable expertise and experience with our Latin American programs and especially overseas—our efforts in Mexico.

Mr. Chairman, as the committee is aware, the United States expended considerable effort in 1992 spearheaded up primarily by EPA and its Mexican counterparts to establish an integrated environmental plan to appropriately address such items as pollution in wastewater and hazardous materials, things that impact the human health. I think now is the opportunity, and I congratulate the interest of this committee, to focus on natural biological resources with the realization that NAFTA, in bringing out economic opportunities and the improvement of economic well-being especially in Mexico, indeed provides an opportunity to prepare for conservation of shared resources with a new level of effort and focus.

I am sure the committee is aware that the Department of Interior has a long history of cooperative programs with Mexico, perhaps dating back originally over five decades ago with the Migratory Bird Treaty Act, certainly one of the globe's longstanding and perhaps most successful international conservation efforts. In that working partnership, we have shared information and resource concerns for decades.

Currently, the Department of the Interior has some 80 specific cooperative programs with Mexico, 17 with the National Park Service, 49 with the Fish and Wildlife Service, and 12 important programs with other agencies. This effort has increased substantially during the last 20 years under the auspices of a working committee that we have with Mexico on wildlife conservation under the Western Hemisphere Conference and the Tripartite Agreement where the United States, Mexico, and Canada have regularly worked on such issues as endangered species, management of land status surveys, wetlands law enforcement, et cetera. It is a good foundation for us to continue this effort as we realize that NAFTA can, indeed, when it brings about increased trade and economic development, improve closer ties.

In December, Mr. Chairman, I took the opportunity to meet with our Mexican counterparts, the heads of three major agencies in Mexico, to talk about and share together six general areas of opportunity under these proceedings that we believe will require increased attention, resources, and cooperation—areas that can benefit both countries, their citizenry, and some important shared resources.

The first area, Mr. Chairman, is border compliance—law enforcement activities related to trade inspection along this extensive line of shared jurisdiction. Currently, because of Mexico's rich biological resources and a convenient thoroughfare for trafficking from other countries throughout the globe and because of the overwhelming size of the United States market, we already have a substantial flow of wildlife products, a considerable portion of those which are now currently illegal.

Of course, the Fish and Wildlife Service is responsible for enforcing our trade laws and in the inspection programs especially under CITES. In '91, we welcomed Mexico to the CITES world family, but they have difficult challenges ahead of them in implementing provisions of the CITES agreement, and we are trying in a shared effort in training and to bring about that implementation. Along the entire Mexican border, the Fish and Wildlife Service currently only has three special agent and aide inspectors to carry out our obligations compared to the several hundreds of personnel our counterparts in customs in AFIS.

The second area, Mr. Chairman, would be habitat protection with increased population increased importance. We have a tremendous opportunity and responsibilities there. Ten percent of the border is now under the jurisdiction of the National Park Service, and we have eight major refuges of over one million acres that will provide increased importance for wildlife habitat and the quality of life of the citizens in Mexico and the United States.

With that growth, we are going to see increased impact on fragile arid and semiarid areas, river corridors, et cetera. So if we can improve the Federal lands, we can focus on other things through the North American Plan and nonFederal cooperative efforts.

The third area, Mr. Chairman, realizing that wildlife knows no borders, is in migratory birds where we share species, and a key to declining populations will be in such programs as our neotropical birds and working closer together. The fourth area, as you mentioned, is endangered species cooperation. The fifth would be environmental assessment—the NEPA process where we must do more to help Mexico with training and technical assistance in a NEPA type. They do have good laws and good programs, but they have little organizational structure or knowledge to implement them.

The next area would be training, and the last area would be environmental education where all our efforts are going to be futile if we don't build a conservation ethic in the citizenries on both sides of the border.

In conclusion, Mr. Chairman, I think overall we have done a good job in identifying important areas for stewardship. The Fish and Wildlife Service has a draft plan looking at these specific programs. Secretary Babbitt promises to be an active participant in the Administration's decisionmaking process through the entire proceedings. He has established at the Department a high level task force to coordinate management and bureaus, and we have to share with the committee a report which looks at all the Interior's activities. Thank you, Mr. Chairman. I would be happy to try to respond to questions.

[The prepared statement of Mr. Turner may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. I guess it is a paradigm of the situation we are in that this is Director Turner's umpteenth appearance before this committee and to the best of my knowledge is the first appearance of anybody from the Office of the U.S. Trade Representative.

Ambassador YERXA. Hopefully not the last, Mr. Chairman.

Mr. STUDDS. I have every confidence that it won't be the last. We didn't expect to get to know you so well so fast, but here we are. Let me see if I can just ask a couple of things, and turn that light on. It applies to us too.

Mr. Ambassador, as you know, this committee spent a lot of time and effort in the last Congress on something called the International Dolphin Conservation Act. The Marine Mammal Protection Act currently requires nation-specific embargoes on dolphin unsafe tuna, and the Dolphin Conservation Act establishes a product ban on all dolphin unsafe tuna beginning in 1994. It would appear that conservation oriented product bans conflict with the current NAFTA provisions. Is that the case, and if it is, how, for example, could a NAFTA environmental protocol resolve this conflict?

Ambassador YERXA. Well, Mr. Chairman, first on your point about the committee's action with respect to the dolphin protection legislation, I wanted to make one initial point; that is, as you know, we still have a dispute with Mexico as to their observance of an appropriate moratorium as called for in that legislation. Ambassador Kantor has made the point to his counterpart that we believe that that is a very important matter. It is quite clear from the legislation that an embargo will remain on imports of tuna from Mexico until Mexico has adopted an appropriate policy with respect to a moratorium on dolphin unsafe methods of fishing.

Your further point, obviously, is one which I think we need to look at in much more specific detail and discuss with you more extensively. It is quite clear that there is an area of controversy in international trade agreements, and I think that is precisely what we are here to talk about and focus on; that is, at what point in extraterritorial application of standards of conservation or environmental protection would trade sanctions or restrictions on trade run into conflict with international agreements. You are aware of the history of this dispute in the GATT I know, and I think it is something we need to have more of a dialog with you on to see if we can't define appropriate parameters of U.S. policy. I cannot give you any explicit answer on how a protocol could address this in the NAFTA itself.

Mr. STUDDS. I gather there is legal action pending, and do you have an official position—does the Office have an official position on whether or not the National Environmental Protection Act, NEPA, applies to international trade agreements generally?

Ambassador YERXA. This is a matter that is currently under litigation.

Mr. STUDDS. So you probably have five lawyers behind you telling you to say nothing?

Ambassador YERXA. I have more than five, Mr. Chairman.

Mr. STUDDS. I see.

Ambassador YERXA. I would say that the Administration has submitted its Brief in this matter. We are waiting for a ruling from

the Court. I don't think there is any secret to what the Administration's position is as stated in that Brief, and I would be happy to make certain that the committee has access to that.

Mr. STUDDS. OK. Mr. Ambassador, yesterday, I gather, before the Senate Finance Committee, Ambassador Kantor supported the concept of a North American Commission on the Environment, but he did not, as I understand it, support the idea of giving that commission enforcement powers. What kind of environmental enforcement provisions do we/you now support for NAFTA, or is that also in the category of as yet to be resolved?

Ambassador YERXA. Well, I was present during Ambassador Kantor's testimony, and you are correct in saying that he wasn't specific as to precisely what enforcement measures we can negotiate in this agreement. It is quite clear that we believe there are a number of ways that a North American Commission can enhance and increase enforcement of national laws. It is also quite clear that we could adopt a number of measures and ask Mexico to adopt a number of measures which would be very effective in creating greater access to the administrative and judicial process in Mexico and greater transparency to their enforcement process, perhaps providing kinds of procedural safeguards and judicial protections for individuals and groups that is anticipated in the intellectual property provisions of the NAFTA agreement, and this is something he spoke about at the hearing yesterday.

With respect to greater enforcement powers of a supranational commission, there are very, very difficult questions that have to be looked at here. This would presumably be a commission composed of representatives from all three countries. We do have concerns about how a commission with powers to impose binding sanctions on governments would apply to United States laws and practice—would apply in areas where both the Federal Government and the states have regulatory and administrative powers.

And we do have to be a little bit careful here about how we would define use of enforcement sanctions for nonenforcement of laws because as you are undoubtedly aware, in many, many cases at any given time in both the labor and environment field, many U.S. citizens or U.S. companies or U.S. firms are not in complete compliance. There is usually an elaborate process, whereby the EPA or another agency brings a compliance action against someone and ultimately, over time, develops either full compliance or a compliance agreement. So we do have questions about how a supranational body would apply to U.S. practice, U.S. law and U.S. sovereignty. That is one concern that we are looking at very carefully.

The real question, it seems to me, Mr. Chairman, is what we can do to substantially increase the enforcement and respect for these laws in North America while at the same time recognizing that sovereignty is a fact of life in international agreements and that we have to try to find the best mechanisms for promoting that greater enforcement but respecting sovereignty.

Mr. STUDDS. Let me withhold for the moment because my time has expired. Let me just say to members who may not have been through this before, we have a Byzantine procedure here where our custom is to recognize those members who were here when the hearing began, alternating between majority and minority side in

order of their seniority on the subcommittee, and then to go to members in the order of their arrival regardless of party. The gentleman from New York.

Mr. HOCHBRUECKNER. Thank you, Mr. Chairman. One of the problems I think many members of Congress have is that when one looks at the United States and Canada with in the neighborhood of \$13 to \$14 hourly average wages, and we look at Mexico with \$1—\$2, clearly, you know, it doesn't take a rocket scientist and certainly my own engineering background says to me logically that we are going to see a tremendous number of jobs moved to Mexico. I don't think anyone will argue that point. It is reality. It is going to happen.

Obviously, at a minimum we need to have a very strong side agreement associated with the environment and with worker protections and retrainings and what have you. We understand that. Today, we are here to deal with the environmental side of that and to get your views as to the direction that we will be going when this side agreement is negotiated. I would like to ask what do you envision—when you sit down next week or whenever you get down to the nitty-gritty of what the United States will be asking of the Mexican Government in terms of the environmental protections, what are some of those areas that are on your wish list or your demand list or whatever list you call it? What will you be asking for when you sit down with your counterparts in Mexico?

Ambassador YERXA. Yes, Congressman. Let me first of all point out that this meeting next week is really the opening session. It is a preliminary session. I do not expect that at that particular point we will have a full detailed proposal to present at the negotiating table. I do think we will present in conceptual form what we envision as being the overall direction we want to go because I think we need, quite frankly, a little bit more time of consultation with you and with interested parties here in the United States before we develop a detailed text of a draft agreement.

But I think at the meeting next week we will try to lay out in broader terms what our overall objectives are and give the Mexicans quite a bit to think about as we await the next meeting, which presumably would follow very shortly thereafter—perhaps within a week or two.

I mentioned earlier that I think we can safely assume that we will stress some very important elements. One is kind of a positive element in our relationship; that is, improved cooperation on environmental safeguards, technical assistance, data sharing, perhaps the development of mechanisms to identify where standards ought to be improved and how they ought to be strengthened. This is something that we sense the government of Mexico is receptive to. So that could be an extremely cooperative element of the overall agreement.

But, of course, we have to have, shall we say, tougher medicine than that, ensuring that there is going to be improved enforcement of national laws. And as I said earlier, many people will tell you that on the books there are some very good laws, very good standards, both in the labor and environment area. There may be areas where they need to be improved, but on balance, they are quite good.

I think we are looking at different mechanisms for ensuring greater enforcement. Part of this is a question of resources in Mexico. They have a limited number of inspectors, a limited number of trained people to enforce the regulations, and we need to look at ways to strengthen that. Part of it is, quite frankly, just opening up the process in Mexico to much, much greater participation, much greater procedural safeguards, and, in essence, adopting some of the methods that we used in this country to create pressure on the government to enforce environmental laws. So those are clearly two areas we are going to look at.

Thirdly, we are going to look at developing an international commission that has some real power to review and conduct inquiries on enforcement practices and on the policies of governments in adopting standards and protection. Once again, as I said, the questions of supranational sovereignty are difficult issues in an international negotiation, but we think that at a minimum this commission has to have some real power to develop the factual body of information to determine how a country is doing, whether it is Mexico or the United States or Canada and to make recommendations and findings with respect to those enforcement questions.

Mr. HOCHBRUECKNER. Ambassador, if we were to provide you with a list of things that we on this committee feel should be part of the negotiation, you would accept that and carry the ball down with your own views from the Administration as to those safeguards that we would like to see negotiated into a side agreement?

Ambassador YERXA. Well, I think, you know, as the Chairman said, this is our first visit here, but I think clearly there is a need for some intensive dialog in the next few weeks as we fully develop the proposed text of these agreements, and I would very much accept and gladly accept that kind of a consultative process to develop our position. Yes.

Mr. HOCHBRUECKNER. Thank you, Ambassador. Thank you, Mr. Chairman.

Mr. STUDDS. Thank you. The gentlewoman from Oregon.

Ms. FURSE. No questions.

Mr. STUDDS. The gentleman from California.

Mr. HAMBURG. Thank you. I would just like to ask whether we have learned anything from our—has it been three years we have had a free trade agreement between Canada and the U.S., Mr. Ambassador?

Ambassador YERXA. It went into effect in the beginning of 1989. That is correct.

Mr. HAMBURG. 1989. Have we learned anything from that relationship that may or may not—well, hopefully that may be helpful in terms of creating the NAFTA, you know, with three parties instead of two? Is there anything we have learned in terms of environmental enforcement, in terms of transfer of plants from one country to another where there are environmental hazards? Has any progress been made?

Ambassador YERXA. Well, of course the situation is somewhat different because, obviously, Canada, like the United States, has had not only quite a strong body of environmental protection but also a record of vigorous enforcement. I think if you look overall at the record of the U.S.-Canada agreement, you will see that it has

actually expanded trade in both directions. It has expanded the overall two-way trade between us. From the figures I have looked at it has not resulted in a huge increase in capital flight from one country to another. Perhaps, if anything, it has led to more large companies moving some of their operations to the United States rather than keeping branch plants in Canada. But overall I think it has led to an increase in trade on both sides.

Mr. HAMBURG. But in your judgment, that movement of some Canadian factories to the United States has not been due to environmental regulation—a differential there? It is more due to—

Ambassador YERXA. Economies—

Mr. HAMBURG [continuing]. labor standards or—

Ambassador YERXA. Very often it is just decisions of the companies with respect to the best way to serve the market. Perhaps in the past, they located in Canada because Canada's trade barriers were high, and in order to serve the Canadian market, they had to be there. And I am not suggesting that this trend has been overwhelming because the thing we ought to keep in mind about both Canada and Mexico is that in neither case are we moving from a situation of totally restricted trade to totally free trade. The fact of the matter is that the U.S.-Canada relationship enjoyed a large element of free trade before the agreement was negotiated.

This is also true with Mexico. U.S. trade barriers on imports from Mexico are already quite low. The average tariffs are about four percent, and we don't have a lot of nontariff barriers. Barriers in Mexico, on the other hand, are on average about two and a half times as high as U.S. barriers. And even in the face of those barriers, we have been dramatically increasing our exports to Mexico because of a reduction in those barriers in Mexico since 1986—a unilateral reduction. And today we are exporting about \$40 billion to Mexico. We were only exporting about \$12 million there in 1986. We have now about a \$6 billion surplus with Mexico.

I do hear a number of the comments about Mexican imports and their dislocating effects on American workers and American jobs. I think it should be pointed out that we envision policies to deal with those problems in certain sectors where we acknowledge those problems will come up, but overall, U.S. barriers on imports from Mexico aren't very high today. And if there was any overall advantage in the trade relationship, it is strongly in the favor of increasing U.S. exports and increasing our trade balance with Mexico.

Mr. HAMBURG. The other question I would like to ask if I might, Director Turner, I was very glad to hear that there has been this long history of cooperation on species protection and habitat protection and that we can look at, you know, a history of work between your department and your counterparts. But I guess my concern is that in light of this cooperation over the years, how can the environmental disasters that are in evidence today have occurred, and will we really have some assurance that these situations will be significantly mitigated? And, you know, I am talking about the maquiladora plants, but I think there are many, many examples. Tijuana is just an environmental mess just on the other side of the border. You know, what can we hope for in light of the fact that we have had all of this cooperation in the past, and, obviously, it is not doing much good?

Mr. TURNER. Congressman, our experience in the past, I think, lays a foundation for the opportunities we have ahead of us, obviously, that Mexico has serious problems as we have serious problems with resources here that are declining because they depend on life-cycle needs south of our border. So we have a shared responsibility.

As the Ambassador said, as we work with Mexico, I find a great deal of dedication and intent to establish good laws and programs. The problems that I think Mexico has because of its size, the complexity of its biological richness, and its very apparent lack of economic resources that that is where we find the greatest opportunity to help them and help ourselves with environmental protection and conservation.

The first emphasis I would say would be training. We have some minimal training programs down there that are making a big difference with land managers, with biological expertise. We simply can do a great deal down there in helping with training. The other would be technical assistance—take our know-how down there, work with their citizenry, and another area would be cooperative programs in management of everything from endangered species to migratory birds. And the fourth would be to help them in environmental education. As they try, Mexico is going to need to utilize these wildlife resources, but we need to do it on a sustained basis. So those are four areas where we are not doing enough. We need a tremendous amount of more resources and assistance from the United States, and we both will benefit from that.

Mr. STUDDS. The gentlewoman from California.

Ms. ESHOO. Thank you, Mr. Chairman. The question that I would like to ask centers in and around where states have more stringent regulations than the Federal Government, and I don't know who can answer this, perhaps the Ambassador, does the GATT or the NAFTA preempt state law?

Ambassador YERXA. Well, let me make it very clear that we were very careful in the NAFTA negotiations not to preempt the states' abilities to adopt more stringent standards than national standards or to adopt standards that varied. The important thing here is that the NAFTA text, the text of the agreement itself, clearly affirms the right of each country to establish the level of protection of human, animal, or plant life or health that it considers appropriate and explicitly states that each country may adopt and enforce standards, be they food, safety, or product safety standards, that are necessary to achieve its chosen level of protection and that those standards would be fully applicable, obviously, to imports as well as to domestic products.

Now, there are some protections in the agreement for situations where a country adopts discriminatory standards; that is, adopts a different standard for a foreign product than it does for a domestic product or treats one of its NAFTA partners discriminatorily to another. But the basic right of each government to maintain its own food safety, product safety standards is quite explicit under the agreement.

Ms. ESHOO. Can a NAFTA or GATT party challenge the state laws as unfair trade practices? What I am hearing you say is no?

Ambassador YERXA. What I am telling you is, of course, you know, international agreements are something like a domestic Court's. There is always a lot of challenges and litigations.

Ms. ESHOO. But is that heartening or depressing?

Ambassador YERXA. Well, it is both. We are satisfied that we would prevail even if there were a challenge of this nature. Of course, you can't prevent another party from challenging something, but we are satisfied that we can maintain the same high standards we have today. I might make the point that having had the pleasure, and sometimes the discomfort, of representing the U.S. in the GATT during the last four years, there has never been a successful challenge to a U.S. product safety or health standard. In fact, there has never been a challenge to any country's health or safety standards in the GATT that has prevailed.

The second point I would make is that even though we have these international agreements like the GATT and the NAFTA, these are not self-executing agreements under U.S. law; that is, if the Congress decides to adopt a certain means of protection, and in the extremely unlikely event that some panel went off half-cocked and found it to be a violation, the U.S. Government would not be automatically obligated to change its law or its practice. And I think this is very important.

Now, that may ultimately result in a dispute under the agreement where the other country feels that it has a right to take some reciprocal action, but ultimately the Congress and the United States Government retain the right to ensure whatever laws and standards we want notwithstanding conflict with an international agreement.

Ms. ESHOO. Thank you. Do I have time for another question, Mr. Chairman?

Mr. STUDDS. It looks green to me.

Ms. ESHOO. OK. As we pursue or discuss the environmental issues here in this committee, is there a plan on the part of the Administration to link in the side agreements the whole issue of standards of labor as well? Because as we try to lift ourselves up and lift up others that we do business with, which is essential, we need to be lifting people up as well. What is supposed to come out of these agreements are economic gains, yet if individuals are really exploited and their living standards are not raised, then it seems to me that we will have really failed miserably. To pursue trade just for the purpose of trade is itself a side issue if we cannot cause the improvement of individuals. So will this be pursued in terms of side agreements? Can it be?

Ambassador YERXA. Yes. Congresswoman, the Administration's objective here is to ensure that as we enter into a freer trade arrangement with Mexico and that it evolve in a way that enhances and improves both standards and application of those standards in both the labor and the environment fields. And we would anticipate a labor agreement—a side agreement on labor—which would deal with the question of adequate standards and how to lift them up.

I think we see the NAFTA as an opportunity to ensure that as this increasing interdependence, which is ultimately inevitable, of countries in North America proceeds, that it proceed in a way

which lifts up living standards, lifts up incomes, lifts up wages, lifts up environmental protection and respect for the environment and resources rather than diminishing them in the United States; that is, creating movement toward higher standards rather than downward harmonization in the U.S. It is very important from our point of view to have agreements which accomplish that.

Now, what is the best means to achieve this goal and what kind of agreements are realizable and practicable is something we clearly have to work with you on.

Ms. ESHOO. Thank you.

Mr. STUDDS. The gentleman from Maryland.

Mr. GILCHREST. Thank you, Mr. Chairman. Mr. Turner, just one quick note. It is good to see you again. I enjoyed your testimony, and the osprey population of the eastern shore is booming, not because they are fishing but they are actually moved inland and they are catching rodents on the ground. It is an amazing phenomena. The osprey are not fishing on the eastern shore. Maybe there should be a study on that.

Thinking about the environment, I think it is incumbent upon us to think globally, not just what happens in San Diego but also what happens in Tijuana. This is sort of a philosophical question. As far as the NAFTA agreement is concerned, do you feel that even with all of the proposed opposition from business and even from some environmental groups concerned about the lack of attendance to pollution by the Mexican Government, that we should proceed as aggressively as we can because without an agreement, the pollution would not improve, it might, in fact, continue to get worse? So should we continue to stumble or to aggressively pursue a NAFTA agreement with all of the arrangements loosely or tightly tied together so that down the road Mexico will improve its environmental record because I think as a number of people have said here today, we still have to live in the global community?

Mr. TURNER. Congressman, let me say first of all as one that did his graduate work with bald eagles and ospreys, I find it quite remarkable your observations on feeding on rodents, and indeed we need to look into that.

It is a very thoughtful question. I don't know if I can give you an adequate response. As you were asking the question, I recall something I read just this morning, and it dealt with the African elephant and that very tough conservation where a Zimbabwe bushman said, "When I am hungry, the elephant is good to eat. When my belly is full, the elephant is a beautiful creature to cherish," and I think that speaks a little bit to—as we struggle with assisting Mexico, and I truly believe that NAFTA, with increased cooperation and resources and helping them with their economic well-being, can, in fact, enable them to be better stewards of their resources.

And so many of the resources we cherish and depend on, whether it is songbirds along the East Coast, whether it is birds that depend on a riparian or forested areas, or some of the serious declines we are now noting in the grasslands of the Midwest, which might be the most severest of all, these resources' long-term well-being is going to depend on how good we do with Mexico with these shared resources.

So I feel that it is an opportunity to focus on resources that we share that do not know borders, whether it is contaminant problems along the Rio Grande that is impacting resources, whether it is—one problem Mexico faces is they look at the NEPA-type process where they assess the environmental impact of new industrial plants or transportation corridors for new population growth. They plan to decentralize that program into 33 states. So just the great need they are going to have and our helping them train people, develop the expertise, the science to do environmental assessment, I think, is in our best interests and certainly in Mexico's best interests.

So I don't know if that is a very good response, but we have great opportunities to improve the legacy of natural resources for this hemisphere, and a key to that will be working with our neighbors in Mexico.

Mr. GILCHREST. Thank you. Mr. Ambassador, given the understanding of a nation's sovereignty, and we are looking to create a free trade hemisphere with Mexico, and given the understanding that—the business climate and the overwhelming environmental problems that exist, if Mexico did not proceed, let us say, with a side environmental agreement quickly enough so that we would recognize that they were not going to pursue a clearer environmental policy, which to a degree would continue to upset the balance of trade because of the reduced regulations that they would have to live under and the salaries of employees on different sides of the border, would Mr. Clinton pursue the policy to its full extent or to the extent that he would sign an agreement before we got—and I don't like to use the word environmental concessions—but until we were sure that Mexico would pursue some of these environmental agreements?

Ambassador YERXA. Congressman, let me thank you for asking that question, because I think we ought to be very, very precise and clear to you about what the linkage is between these side agreements and the NAFTA itself. The NAFTA has been signed. It was signed by the previous President, and President Clinton has said that he will not present the NAFTA to the Congress for implementation until satisfactory side agreements have been negotiated and until we are able to present to you the results of those side agreements. So I want to be very clear. I am not issuing an ultimatum to our trading partners here, but we simply will not present this agreement for implementation until after those supplemental agreements have been concluded.

Mr. GILCHREST. Thank you.

Mr. STUDDS. Let me ask the gentleman, was it under the old or the new Administration that the osprey began acting oddly?

Mr. GILCHREST. I would like to invite Mr. Turner down to Kennedyville, Maryland, because this is really—I have told this to some other people about the osprey, and they simply don't believe it. But there is an osprey—there are two actually that I pass—

Mr. STUDDS. We believe you.

Mr. GILCHREST. Do you believe us?

Mr. STUDDS. Yes.

Mr. GILCHREST. OK. And I would like to invite the committee to Kennedyville to study this.

Mr. STUDDS. I am afraid of what we might learn. Let me just, first of all, thank you. Again, I apologize for the delay. Let me make one observation, if I may, Mr. Ambassador. You, I am sure, are aware of, and I don't know if you are able to stay for the next panel or whether you have had a chance to look at their testimony, but there is a good deal of genuine and strong concern on the part of the environmental community about what has occurred, what might occur, what ought to occur. I think that concern is compounded by the fact that unlike the way we do business here, you generally do it behind closed doors, given, I gather, the nature of your trade. But you have made a transition, and we trust it is a significant transition. I think many of us here feel that there is, hopefully, a sea change between the approach of your preceding bosses and your new bosses, and that some of the concern and alarm which will be expressed immediately upon your departure will turn out to be not well-founded.

But I would ask to the extent that you are able to do so that you find a way to listen to, communicate with, and to bring into the arcane process in which you are involved the knowledgeable and caring people who have given a great many years to assisting this and other bodies in coming up with what we think are some pretty sound laws which many people perceive to be at risk with some basis in current fact, as you know.

Ambassador YERXA. Could I just briefly respond, Mr. Chairman? I think it is very important for us to develop ways of having a greater transparency in the development of trade policy and in trade negotiations. We are endeavoring to do that and to find ways and particularly in this critical area of the environment of expanding the consultative process and the participation of interested groups.

I should say that that is not always an easy task because, obviously, you are engaged in negotiations with other governments, and you do have to at times take account of the need not to have your entire negotiating strategy laid out in public. But I think we can do better.

Mr. STUDDS. Thank you. I appreciate that. I just realized the gentlewoman from Arkansas has returned. I apologize.

Ms. LAMBERT. Do I still have—OK. First, I would like to thank the Chairman for bringing the issue before us. It is an important one for us in Arkansas. We are close to the borders as well as being a rural district. I do represent 25 extremely rural counties which are heavily dependent on the agricultural economy, and I am very interested to see the modifications and to discuss and be a part of—to see the agricultural community a part of those negotiations as far as those modifications are. And if there is any light that you can shed on some of the effects we may see or the positions the Administration may have on that, certainly seeing that over the past years the agricultural chemicals that have been used in this nation have been curbed and certainly brought under different regulations, and I think the American farmer has worked diligently to comply with that.

It is interesting though when, I believe, as freshmen we were in a seminar, I asked the question what would be done about all of the crops that compete with our American crops through the use of

those chemicals that are outlawed in our nation but are used in Mexico and in other nations—how could that be dealt with, and the response that was given to me from, I believe, your predecessor was inspection at the borders, and that alarms me.

I don't know that we have the necessary inspection currently, and at the point that trade would be speeded up, I don't know that additional inspection could actually do the trick, and I would like to see where those ideas may be coming as far as from the Administration currently on modifications as well as the concerns of the nonsignatory countries that may be accruing NAFTA benefits, whether the rules or origin are going to be a part of the negotiations and where we might see that headed. Can you shed some light on those?

Ambassador YERXA. Well, let me say that I think I ought to try to get you some detailed answers because I would have to look into precisely what the response you got from the previous Administration was and how that response—

Ms. LAMBERT. Well, it was before the E-COLA, and they just said that we had tremendous inspectors at the borders and elsewhere, and to me it was a little bit concerning.

Ambassador YERXA. Of course, you know, we do have—I mean, it is true. I am not trying to justify a response you got before, but there is an elaborate system of inspection, both domestically and at the border, but maybe I ought to try to give you a fuller answer than that, and if I could provide you something in writing, I will.

Ms. LAMBERT. Certainly. I would be glad to—

Ambassador YERXA. OK. All right.

Ms. LAMBERT. Just a note for the farmers. That is all.

Mr. STUDDS. Let me thank both of you for your patience. We have a lot of work to do. My plea for including the knowledgeable and caring folks of the environmental community in your discussions would extend to the Members of Congress as well. I think all of us want fervently to be able to support as strongly as we can what it is you bring back, and I think all of our efforts should be devoted to that end. Thank you.

As we transition, if that is a verb, to the next panel, let me again invite anyone who wishes to sit up here, there are five extra seats. Anyone who needs to sit down or write is welcome to come up as quickly as possible. We will begin in two minutes so reorient yourselves. Let us try to bring this thing back to order if we can.

[Pause.]

Mr. STUDDS. OK. The music has stopped. I again apologize to this panel for holding you. I know everyone is very busy. We will try to expedite this as best we can. I think you were all here, and you learned the gruesome facts about those lights, and you have been asked, I am sure, to summarize or at least to confine your oral statements to no more than five minutes. We will ask you to do that if you will.

Those of you with longer testimony can be assured that it will all appear in full in the record, and future historians will never know you summarized it. We will proceed to hear this entire panel in the order in which your names appear on the list, and then we will have questions. We will begin with Mr. John Audley, a trade ana-

lyst for the Sierra Club. Mr. Audley. You are going to have to bring that embarrassingly close.

STATEMENT OF JOHN AUDLEY, TRADE ANALYST, SIERRA CLUB

Mr. AUDLEY. Thank you, Mr. Chairman. Among the policy objectives facing government today, two—protecting the global environment and building sustainable economies—stand out in terms of their importance. Increasingly, national governments look to liberalized trade regimes as a means of building economies, but increased trade expands the scale of human activity and, therefore, has uncertain environmental effects. It is, therefore, not surprising that within the arena of trade treaty negotiations, a conflict between the goals of greater environmental protections and greater economic activity has arisen. Understanding the context in which this conflict takes place will be the focus of my presentation.

There are two important lessons to be learned from this brief discussion. The first is that the relationship between trade and the environment is extremely complicated. It extends beyond trade and environmental policy and touches the cultures, values, and dreams of communities and nations around the world. Therefore, legislators should not look toward a single trade or environmental agreement as a solution to all the world's economic or ecological problems.

The second lesson is that the debate between these two issues is shaped in terms of trade first and the environment second. Environmental goals must learn to navigate through principles of economic growth and comparative advantage, not the other way around. Real solutions to the problems between trade and the environment, however, lie in examining the entire set of circumstances that pit these two issues against one another. At the very least, environmental concerns must be placed on par with the demands of ever growing economies, and we must learn to discipline our consumption to alleviate the constant pressures to produce more and more goods.

The debate between trade and the environment is best understood if you take a minute to appreciate the very fundamental differences in the way both advocates view a number of very important issues. Trade advocates are committed to economic growth as a solution to environmental problems. On the other hand, environmentalists emphasize the sustainable development and its implication that human beings must learn to temper their levels of consumption by the ability of the environment to withstand it.

Second, trade advocates are committed to markets as capable institutions of establishing accurate values for natural resources and environmental protection. Environmentalists challenge the basic assumption that many of the world's resources are capable of being defined simply in terms of price. And, finally, trade advocates believe that the more efficient use of natural resources equates to environmental protection while environmentalists counter that efficiency means nothing in the long run if the total amount of waste and level of environmental destruction continues at a more efficient level.

The differences I have just outlined have translated into a war of philosophies where both parties claim improved quality of life as their goal. This war is currently being fought out in three arenas: the completion of the Uruguay Round of GATT, the North American Free Trade Agreement, and at the Organization for Economic Cooperation and Development. Since my colleagues will discuss NAFTA and OECD more explicitly, I will focus the remainder of my comments on the overall structure of global trade and, in particular, GATT.

GATT reflects more than 40 years of efforts by industrialized nations to reduce all trade barriers between countries. Today, more than 108 countries have agreed to the terms of GATT trade rules. GATT is an international agreement and has only the power that each member country is willing to grant. This minimal authority granted GATT has become quite an obstacle to the goals of trade advocates as countries can and do restrict domestic markets for a variety of reasons. One of those reasons is in the name of environmental protection. So one of the objectives for trade advocates has been to compel countries to accept stronger disciplines of self-constraint including environmental constraint.

The Uruguay Round of GATT, begun in 1986, is dedicated to this goal. The Uruguay Round is trying to end subsidies, price support, formal and informal trade constraints which block market access. In addition, it is attempting to harmonize standards between countries to facilitate international commerce. Unfortunately, these goals have tremendous impact on environmental regulations which were not designed to withstand the economic rigor of GATT's trade principles. And if the Uruguay Round is passed as written, GATT will have even greater influence of the makeup of domestic laws because it will be able to authorize countervailing duties designed to compel countries to comply with GATT decisions.

No example of this conflict between domestic environmental laws and GATT jumps to mind more quickly than tuna dolphin. Under the current GATT trade agreement, the United States was able to block the implementation of the GATT panel decision which determined that portions of the Marine Mammal Protection Act were inconsistent with GATT trade principles. However, under the current round, complaining parties would be able to impose countervailing duties on products exported from the United States into their markets to compensate for market loss.

I believe that the environmentalists understand the importance of finding a balance between the role trade can play in eliminating poverty and the need to protect the environment. As we search for this balance, we have asked trade advocates to understand the principles which drive environmental action and accept some of the lessons regarding environmental protection. Unfortunately, in the view of the Sierra Club, neither the Uruguay Round nor the OECD did discussions on trade and environment, nor the NAFTA as written reflects any balance between trade rules and environmental goals. Thank you.

[The prepared statement of Mr. Audley may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Next, Mr. Robert Housman of the Center for International Environmental Law. Mr. Housman.

STATEMENT OF ROBERT HOUSMAN, ATTORNEY, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

Mr. HOUSMAN. Thank you, Mr. Chairman and members of the committee for this opportunity to appear before you today. Mr. Audley has laid out an excellent discussion of the interlinkages between trade and environment. I am going to talk about trade and environment policymaking. I also feel compelled to deviate from my prepared remarks to address some of Ambassador Yerxa's comments today, and I will supplement my written testimony to reflect that.

The interagency process attempting to develop U.S. trade and environment policies has expended over 4,600 hours over the last two years and not one single trade and environment policy has resulted. If this was occurring in the private sector, I would hazard to say that all the individuals involved would be looking for other jobs. The threat here is substantial. While I don't care to dwell on the past, as Sant said, "Those who don't remember the past are condemned to repeat it."

While the U.S. continues to flounder in trade and environment policymaking, other countries are racing ahead of us, such as at the OECD in crafting principles, that advance their interests but run counter to those of the United States. For example, there is a push to craft a OECD principle that minimizes the use of unilateral trade measures. This would not only run counter to the Marine Mammal Protection Act, which the Chairman discussed earlier, but it would also run counter to vital trade legislation such as Section 301. These OECD processes and GATT processes pose substantial risks to U.S. environmental laws and U.S. domestic economic competitiveness. There is a serious need here for change.

The interagency process must be jump-started, but ill-conceived, hastily drafted policies are not the answer. What we need here is an open trade environment process, bringing in affected communities and agencies as well as Congress, with an eye toward achieving common ground and mutually acceptable policies. A Federal advisory committee approach here would be appropriate—similar to the one adopted by EPA in the neg-reg or negotiated rulemaking approaches to implementing the Clean Air Act amendments. We also need a better balance between trade and environmental agencies in the interagency process, and I would commend to your attention our written testimony which describes changes necessary in the agencies' structure to follow up on that.

I also believe that there needs to be a new role for Congress. The debate over fast-track reauthorization will be a contentious one. Ultimately, the fate of fast-track may lie in this Congress's ability to work with the Clinton Administration and the environmental community to craft a modified fast-track approach that provides adequate environmental benchmarks as part of negotiating goals along with procedures for congressional and public participation in the negotiating process.

This brings me to the role of the public. The public has also been shunted from trade policymaking and needs to be brought back to the fold. There is a mechanism for doing this. It is the private sector advisory system set up by Congress in 1974. We vitally need an EPAC, an Environmental Policy Advisory Committee for Trade Negotiations and Trade Policy. This is a step USTR could take immediately to begin the process of integrating trade and the environment.

I now wish to discuss briefly some of the proposals raised by the Administration over the last two days. I commend the Administration for these proposals. I believe they are a good starting point, but as President Clinton has said, "The Devil is in the details." Problems remain with the administration of justice in Mexico. Corruption remains rife in the judicial system and needs to be addressed before we place all our emphasis on judicial remedies within domestic courts.

Similarly, if we are going to rely upon domestic courts, standing doctrines will need to be revisited. As you all know, the Supreme Court recently curtailed international standing during the last term. If we are going to operate under these new standing norms, there will be inadequate remedies for environmental harm. There are also serious limits to the use of litigation. It is costly, and it tends to leave the little guy out of the bargain, unless they can find a lawyer willing to do *pro bono* work which they may not always be capable of. Standing is also made more difficult if environmental plaintiffs have to come from Mexico to the United States.

I also am concerned about the lack of independent monitoring within the North American Commission. A commission that must rely upon domestic agencies to conduct monitoring efforts over their own programs is problematic.

Finally, I would add in this regard that there is a need for trade sanctions. The IPR sections of the NAFTA provide that if a party doesn't implement the IPR provisions, trade sanctions can be used through the Chapter 20 dispute resolution mechanism against them. I would hope that if the Administration is following the IPR sections as a model for a supplemental environmental agreement that similar provisions would be made for the environment.

Finally, as Ambassador Michael Smith, former U.S. Ambassador to the GATT, has said, trade and environment policymaking is like a runaway train. There are, however, different approaches to dealing with this train. We can either: (a) lie down in front of the train and get run over, jeopardizing both our economic and environmental interests in the process, or (b) get in the cab and steer. The good news is the United States hasn't reached the point at which we are being rolled over—not just yet. The bad news is that we are chasing the caboose.

Trade and environment policymaking processes in the United States are in need of a substantial overhaul. Absent significant changes to the U.S. trade and environment policymaking process, the interaction of trade and environment issues threatens to undermine both U.S. economic and environmental interests. Given the pace with which these issues are moving forward and the relative inexperience of policymakers in this new field, such an overhaul

should be neither unexpected nor resisted. Hopefully our written testimony provides a framework for such an overhaul. Thank you.

[The prepared statement of Mr. Housman may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, Mr. Housman. Next, Mr. Ralph Nader, Public Citizen. Mr. Nader, welcome.

STATEMENT OF RALPH NADER, PUBLIC CITIZEN; ACCOMPANIED BY LORI WALLACH, DIRECTOR, PUBLIC CITIZEN'S TRADE PROGRAM

STATEMENT OF RALPH NADER

Mr. NADER. Thank you, Mr. Chairman, and thank you very much for holding these hearings. I thought your opening statement was right to the point and avoided some of the technical jargon such as we heard earlier where the word "transparency" is now used to substitute for "openness". With me is Lori Wallach who is Director of Public Citizen's trade program, and I want to ask her to respond to the Ambassador's point on pre-emption. I will allocate 60 seconds and 10 nanoseconds for her response.

Ms. WALLACH. Ralph asked me to address three points. One is the issue of the relationship of the trade agreements to states. It is the case that if a state law or regulation is higher than the international standards laid out in the GATT or the NAFTA, then that state law, in fact, as Congresswoman Eshoo questioned, can be challenged. Worse, under a case just last year in the GATT which finally established the ranking of state and local law in relationship to international executive agreements which was what the GATT and the NAFTA are. They are not treaties. In that case, USTR, including Ambassador Yerxa, admitted as a matter of our constitutional law and this international law, U.S. state and local laws are inferior to GATT and to any international executive agreement. That panel then ruled that the Federal Government in the case of state law would get held to be against the GATT would have to take all constitutionally available measures to get rid of that state law. The Federal Government is responsible.

State laws that have already been listed as likely targets are Proposition 65, the BGH ban in a couple of states, and raw log export bans in Oregon and Washington States. That is either in the press or in official documents. Those have already been targeted.

Point number 2 is this whole issue of the level of protection and the means a country can take. The actual language in NAFTA and GATT is not that any country can have any level of protection picked out of the air. You can have a level of protection "in accordance" with the other terms of the agreement—key little clause—because the "in accordance" requires you, for instance, in the case of setting your level of protection to take into consideration international risk assessment procedures, have a certain role for science, and a variety of other requirements that, in fact, would limit the level of protection you can choose.

The second piece of that is the issue of what means you can then use to get to that level of protection. If fact, it is not again open season as was suggested. Rather, you are required to have the least restrictive to trade mechanism to achieve your level of protection.

You can't use a process standard to get at achieving that level of protection.

And, finally, the last point was the U.S.-Canada agreement. I would refer people to a lawyer at the Canadian Environmental Law Association, Stephen Schreibman. He has written a lot on this. The basic bottom line was Canadian environmental protections were higher. They were dragged down in pesticides and in a variety of other places, and there has been a gruesome record back and forth of challenges and threatened challenges of each other's environmental laws. Thank you.

Mr. NADER. I want to show the committee—this is the North American Trade Agreement. It sells for \$80 by the GPO, thereby presumably to set it up for best-seller status among the American people. It took months for the Bush Administration to send this material over to GPO—from August until December. This is a reflection of the secrecy that has suffused the entire process.

Mr. STUDDS. You mean nontransparent opaqueness, do you?

Mr. NADER. Yes. Fewer people understand this trade agreement than understand Einstein's theory of relativity, and you can imagine how large the GATT agreement will be. We are rushing under the fast-track procedure into a pell-mell, serious, long-term and hard-to-reverse abridgement of our national sovereignty, our Federal system, our open procedures in terms of freedom of information, access by individuals, judicial review, ceding more of these procedures to an autocratic structure which makes up these trade agreements.

It is very important to concentrate on the emerging trade agreement autocracy that will prevail over our democracy. The trend of our 20th Century history in this country is to subordinate mercantile values to health, safety, and other nonmercantile values. That is the nature of the consumer, environmental, and worker safety laws. The trend is also to open up the procedures and give people an opportunity to know, to hear, to talk, to participate, and to appeal.

Unfortunately, this trend is reversed by these trade agreements which have as their premise the unlikely assumption that a modest police state and a modest democracy can engage in a fundamental, economic integration based on nominally similar laws but grossly dissimilar likelihood of enforcement. I refer to Mexico and the United States in that regard. Already, citizens at the local area, whether they are in Massachusetts or California or elsewhere, are being told that they can't press these initiatives to expand health, safety, and other standards in our society because it will violate pending international trade agreements. This is happening in Canada with the drug compulsory licensing law which was just repealed by the Parliament on the grounds that it would violate the pending NAFTA agreement.

To have a 60- to 90-day period of approval with only 20 hours of debate in the House of Representatives is to surrender the proper prerogatives of members of Congress to participate with the constituents back home in a process of deliberation that allows for revision, otherwise called amendments, on the floor. Thank you.

[The prepared statement of Mr. Nader and Ms. Wallach may be found at the end of the hearing.]

Mr. STUDDS. Thank you. As I recall, the first Reagan budget, Gramm-Lotta, was approximately that thickness, and we did it in one hour so we have the capacity to do these things. I appreciate that. Next is Ms. Barbara Dudley, Executive Director of Greenpeace. Ms. Dudley.

**STATEMENT OF BARBARA DUDLEY, EXECUTIVE DIRECTOR,
GREENPEACE**

Ms. DUDLEY. Thank you. And, again, Chairman Studds, thank you very much for having these hearings. I think it is a great step forward. You have fairly lengthy testimony from Greenpeace in written form and also two detailed studies on trade and environment, one which specifically focuses on the energy aspects of the North American Free Trade Agreement which we think are a fairly central problem, and I would like to enter those into the record as well as my testimony.

But, of course, I don't want to stick to my written testimony. What I would like to do actually is to back up for just a minute and try to describe what I think is going on here which is a clash between what started in Bretton Woods about 50 years ago and what started perhaps with Rachel Carson about 30 years ago. Those two trends, one toward globalization of the economies of all of our countries and corporations, and the other toward an increasing understanding that the massive corporate trade agenda for the world was destroying the planet and the public's health, and that there was a necessity to regulate that trade—those two agendas have completely clashed and are clashing right now here in your hearing room, and you need to take notice of that.

This is not something that can be fixed easily. It needs to be examined very, very carefully. There are two paradigms of development essentially available to us. One of them is the one you might recall we used to call Reaganomics. That is the one that is embodied in the NAFTA and in the Uruguay Round of GATT. It is a deregulation agenda. It is designed to essentially get rid of pesky labor and environmental regulations that interfere with trade. That is how they saw it. You might remember that is what happened to us. For the last 12 years, we were deregulated.

The initiation of the Uruguay Round in 1986 was designed to take that very deregulation globally. They, in fact, wanted to enshrine an environmental regime into the GATT. It was an environmental regime that said we will have untrammelled access to the planet's resources and to the planet as a dump for our waste. We will essentially continue what we have been doing in the United States which is to make the public pay for private profits. Private enterprise has had full access to natural resources without having to pay, as we know, full costs for them, and the public has paid in public health costs which we know are soaring, and the public has paid also in terms of cleaning up after the elephants in the parade.

Now, the question is whether or not you can take this NAFTA and fix it with these supplemental agreements. I think that is the question that you are going to be asked over time. We don't say it is impossible. We say it is going to be very difficult because enshrined in the NAFTA are several fundamental things which just

can't be tinkered with. One of them is giving the United States untrammelled access to fossil fuels and to other nonrenewable sources of energy. It is going to feed our appetite for fossil fuels. It is going to get in the way of Clinton's interest in moving toward renewable energy resources. It is going to be the total contrary of the BTU tax that he introduced in his economic plan.

There are other parts of his economic plan which are going to be utterly defeated by Bush's NAFTA, and we have to understand it is Bush's NAFTA—it is someone else's program. And it is now being stacked up against the Clinton plan, and it is going to fail if it is looked at carefully. If we let it slide by as an economic and environmental plan, it is not going to work. What is wrong with the NAFTA is not that the Rio Grande is dirty. What is wrong with the NAFTA is not what is happening along the border. It is much more profound than that.

It is, for example, going to throw millions perhaps of peasants in Mexico off the land as we introduce agribusiness and take away agricultural subsidies. Where are they going? Where do we think they are going to end up? Can Mexico City or Los Angeles handle another million people? Have we thought about that? Is that not an environmental problem?

What is the accession clause all about? We are going to negotiate three side agreements here. With whom? With Canada and with Mexico? What about all these other countries that are poised and ready to sign up? Chile is coming in the next day. The rest of South America is coming in shortly thereafter. Are they going to be parties to the three side agreements, or aren't they?

There are a lot of questions that haven't been answered that are profound kinds of questions. What is the legal weight of the supplemental agreements that we are talking about?

One of the things I want to end with is to say that we do believe there is a possible paradigm which would include trade and environment in an agreement that would really be about sustainable development. We do not believe this is it. We do not believe you can have a free trade agreement with a country as poor as Mexico with no transfer of technology or funds, with no development fund for them, and then berate them and put up trade barriers because they do not have the financial capability of enforcing any environmental regulations. This is a debt-driven agreement for them. Their income from it is going to go to pay off their debt to northern banks, and that is what it is about from Mexico's point of view. Thank you.

[The prepared statement of Ms. Dudley and two environmental studies may be found at the end of the hearing.]

MR. STUDDS. Thank you very much. Next, Mr. William Snape from the Defenders of Wildlife. Mr. Snape.

STATEMENT OF WILLIAM SNAPE, ASSOCIATE COUNSEL, DEFENDERS OF WILDLIFE

MR. SNAPE. Thank you, Mr. Chairman. I too will deviate from my written remarks and concentrate only on a couple points. Although industrial pollution along the border and in cities like Mexico City has received the bulk of attention among environmentalists,

NAFTA's effects upon wildlife and its habitat must be identified and addressed to effectively conserve this continent's biological diversity. NAFTA also must not affect the parties' obligations under existing treaties and agreements like the biodiversity treaty to which Mexico and Canada are signatories.

At present, the Fish and Wildlife Service simply does not possess the personnel or funding to deal effectively with Mexican conservation concerns affecting the U.S. In the United States, NAFTA will increase human traffic along the border and place additional pressure on natural resources of southwestern Texas, southwestern New Mexico, southern Arizona, and southern California. Surface and subsurface water sources will be stressed further. Development could easily fragment wildlife habitats threatening the various ecosystems' biological diversity.

Also of concern are the many bridges that will be erected between the U.S. and Mexico. Along the Rio Grande from the Gulf of Mexico to Del Rio, Texas, alone, more than 20 bridges have already been proposed. Equally troublesome is the proposed drug interdiction road along the entire stretch of the U.S.-Mexico border. These actions by Federal agencies like USTR, Department of Transportation, or any other Federal agency should be carried out in compliance with U.S. conservation and environmental laws such as Section 7 of the Endangered Species Act.

In the interior of Mexico, NAFTA could induce and perpetuate harmful land use practices as Barbara Dudley just mentioned, as well as risk the long-term economic viability of its natural resources. And here I should note that although standards and environmental standards between the United States and Mexico for air, water, and waste might be similar—in terms of conservation standards, I think the jury is still out. There are major questions about Mexican conservation standards. I myself attempted over the course of the last month to do research on these standards, and they are very difficult to locate, and I think we need to identify ourselves what those conservation standards are.

The NAFTA parties must forcefully address the enforcement of existing environmental laws in Mexico, the United States, and Canada. And here I think Mr. Housman has adequately addressed some of the concerns of the environmental community. I am not so sure that the IPR proposal which we heard from Ambassador Yerxa will answer all our questions about enforcement. Nonetheless, it is a good first step. Any effective enforcement mechanism that we eventually put into place must implement the polluter pays principle into NAFTA, and this polluter pays principle should be implemented in all trade agreements.

One major obstacle precluding adequate environmental enforcement in Mexico is money, and this brings up the point that the North American Free Trade Agreement is not a free ride. It will cost a lot of money, and we all ought to be aware of that. Another related obstacle is the lack of available technological expertise in Mexico which often leads to either insufficient technical regulations to implement laws or environmental noncompliance by specific industries.

In this regard, Defenders has been working with the Environmental Business Council, which testified before this subcommittee

two weeks ago, to link enforcement mechanisms either under NACE, or under the IPR provisions, with technological exports from the United States. The United States possesses many companies that have this technological expertise. It is just a matter of getting their foot in the door in Mexico, and I think in this regard, this would be a perfect carrot-and-stick, to have enforcement and technological assistance for Mexican industries not in compliance with applicable standards.

There has been a lot of talk about the North American Commission on the Environment, and I think these discussions are all good, and we all look forward to an effective NACE. But NACE is not a total panacea for NAFTA. A letter, which was signed by 25 environmental conservation and consumer groups sent to Ambassador Kantor late last week, I think adequately describes many of those problems. One problem in particular, which is of particular note to this subcommittee, and which the subcommittee has a lot of history on, is the problem of production and process standards. Trade law must recognize that how a product is produced is just as important as the quality of the product itself. Only by recognizing process based trade restrictions will governments retain their ability to keep high domestic standards without placing domestic producers at a competitive disadvantage.

The failure of an agreement between the United States and Mexico as a result of the International Dolphin Conservation Act only serves to underscore the necessity for a specific text in the NAFTA package setting forth the right of NAFTA parties to set standards and distinguish between products on the basis on production methods. It also underscores the need to demand that Mexico immediately enter into the moratorium agreement as a condition to NAFTA.

Another point on negotiation—I was a bit disappointed with the wish list that Ambassador Yerxa gave this subcommittee. I think that it was a good start, but I think that our wish list ought to be a little stronger, and I think that we might run the risk of sending a wrong message to Mexico if we come with a package next week that is not as strong as it could be. As we all know with negotiations, you often start at a certain point and have to retreat, and I think we ought to start with a very strong environmental position.

In conclusion, the large number of gray areas in the present NAFTA text fuels a lot of anxieties, and as Disraeli already has more eloquently stated, "Free trade should be a means to an end and not an end itself." We all have much work to perform if a successful environmental protocol is to be established. In order to realize the impressive potential potential of NAFTA, however, "traditional" rules of international trade must be reformed to integrate fully environmental, conservation and other safety concerns. Thank you very much.

[The prepared statement of Mr. Snape may be found at the end of the hearing.]

Mr. STUDDS. Thank you, sir. Our final member of this panel is Dr. Khosrow Fatemi from the Graduate School of International Trade and Business Administration at Laredo State University. Dr. Fatemi, welcome.

**STATEMENT OF KHOSROW FATEMI, DEAN, GRADUATE SCHOOL
OF INTERNATIONAL TRADE AND BUSINESS ADMINISTRATION,
LAREDO STATE UNIVERSITY, LAREDO, TEXAS**

Mr. FATEMI. Thank you very much, Mr. Chairman. It is a pleasure for me to be here today, and I thank you for the privilege. Also, not adamantly opposed to NAFTA, I feel like a distinct minority of one on this panel.

For the residents of the region bordering Mexico, the North American Free Trade Agreement is an issue of great importance and concern. On the one hand, there are environmental concerns. For the people who live in this region, the environmental impact of NAFTA is a real and tangible issue, one which affects the lives of the border residents on a daily basis. After all, it is they who breathe the air and drink the water which may be, and indeed the latter is, highly polluted.

On the other hand, there is a promise of increased economic activity and greater economic development. For a region with a level of economic development more in line with that of the developing countries than the world's most prosperous nation, this is a great motivation.

For the residents of the region bordering Mexico, the environmental impact of the NAFTA is one that will significantly affect every aspect of their lives. In transportation, for example, the Port of Laredo currently handles approximately 30,000 south-bound loaded trailer-trucks every month. This does not include thousands of empty trailer-trucks, nor does it include close to 9,000 smaller trucks and over half a million other private vehicles. If the recent trends continue, all of these numbers will double every five to seven years. The implementation of the NAFTA will most likely accelerate this growth and probably substantially. The border region is hardly prepared to cope with the environmental impact of this traffic now and will be less prepared to do so once the expected increase in the flow of traffic materializes.

The residents of the border region also have a second, maybe more significant, concern; that is, the economic status of the region. The cities and the counties on the border with Mexico are among the poorest in the country. For example, per capita income in Laredo is less than \$9,000 which is less than one half of the national average for the United States. Furthermore, and more specifically, border towns lack a manufacturing base, they are deficient in economic infrastructure, and generally lack economic diversity needed for sustainable economic growth and development.

For example, despite enormous improvement in recent years, in the case of Laredo, one-third of the private sector employment is in retailing which is highly susceptible to exogenous variables, and the city's manufacturing labor force is one-fifth of the national average.

Given the reality of the situation, border residents of the region bordering Mexico, striking a reasonable balance between economic considerations and environmental concerns, is a necessity, not a luxury. For the region, the NAFTA may bring about such a balance. It may also help the region get out of its economic quagmire.

In this context, the NAFTA could serve as a blueprint for a promising future for that region.

The implementation of the North American Free Trade Agreement will increase economic activity in the region bordering Mexico. In particular, it will expand international trade across the border. Considering the significance of this sector in the region's economy, this could mean more economic activity and more jobs in the region. For a region with unemployment rates which have rarely been in single digits and are often twice, sometimes three times the national average, this depicts a very promising future. On the other hand, this expanded trade will also translate into increased cross-border transportation; that is more trucks and trains going through the border cities and towns.

A great deal of planning will be required to prepare for this increased transportation and to avoid more traffic jams, more air pollution, more noise pollution, and more water pollution. Additionally, in building more roads and bridges to accommodate this growth, it will be very important to be cognizant of their impact on the environment of the region. The first step in solving any problem is, of course, recognizing the problem. In the case of the environmental hazards of the U.S.-Mexico border region, this point has not yet been reached. The magnitude of the quandary, even in the simple case of the transportation of hazardous materials through the region, is at best partially known.

Only in recent months have serious attempts been made to keep track of the transportation of hazardous and chemical materials through the border. The progress made in this area in recent months notwithstanding, the available information is simply inadequate. Regardless of what else is decided about the environmental impact of the NAFTA, it is strongly recommended that steps be taken to gain an understanding of the problem and at least measure its magnitude. Until this is done, any action taken to resolve the problem can hardly be effective.

Finally, for the residents of the region bordering Mexico, it is extremely important that a reasonable balance is maintained between tangible and basic economic needs of the region and the environmental concerns of its residents. In this context, environmental concerns must be given new consideration. This, however, does not include holding NAFTA's ratification hostage to idealistic environmental goals of external constituencies. Doing so is a detriment to bringing economic development to the region bordering Mexico, and this is a luxury that the region with a per capita income of one half of the national average cannot afford. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Fatemi may be found at the end of the hearing.]

Mr. STUDDS. Thank you very much, sir. Let us reverse the usual order here and go first to our colleagues. The gentleman from California.

Mr. HAMBURG. I want to thank the panel. This was very informative. I think it is very helpful to get all of your statements into the record, and I think we are embarking on an extremely important part in our national and international trade history. And so I appreciate your coming here, and I appreciate your comments. I

would like to ask Ms. Dudley to just expand a little bit on her discussion about the two paradigms. And you talked about NAFTA being part of a certain paradigm of development that you characterized—I am not sure you used the word Reaganomics, but you talked about the deregulatory framework, and I certainly agree with you. As we say around here in the Congress, I would like to associate myself with those remarks. I believe that NAFTA is classic Reaganomics, classic trickledown, and I don't believe it will work any better than the economics of the 80's did.

You mentioned, however, that there is another paradigm, that there is another way that we can achieve some of the things that Dr. Fatemi spoke to, and I think all of us in this room would like to see conditions improved along the border region, conditions improved in Mexico and Latin America, and here in our own country. I mean, we were in a hearing yesterday in which some of the environmental disasters of our own country were discussed, and here we are talking as if, you know, we are the Big Brother that knows so much about how to take care of our own environment that we are not going to go down and tell the Mexicans how to do it. That seems a little specious to me. But if you would, Ms. Dudley—if you could just discuss a little bit what this other paradigm is.

Ms. DUDLEY. I actually really appreciate the comment you just made about us having so much to teach Mexico because I think that has been an underlying theme that I am very uncomfortable with as well. When I speak of another paradigm, there has been a lot of conversation since, in fact, the Uruguay Round was first noticed by environmentalists, and then since NAFTA began, among environmentalists and others—many other allies about what a development plan might look like that would be positive, that would be positive for the environment and for the economy.

And I think to some extent even our President has begun to speak in those terms. I was surprised when he gave his economic address to Congress, that he said something which I had never heard said in that audience before which was that even though there were signs of economic recovery, you had to look at whether or not it spoke to employment and not just profit taking, and I think that that—I am sure that I am paraphrasing—but I think that that is the essential piece. Whose economy are we talking about? Are we talking about a quality of life, quality of jobs, and quality of environment and public health, or aren't we? And the whole public/private divide is a very important aspect of that to be looking at.

Environmentalists talk about the internalities and externalities and internalizing environmental costs. I think the NAFTA as it is currently written virtually forbids internalizing environmental costs, and yet we all know that that is exactly the direction we have to go in if we are going to start creating a healthy economy as well as a healthy environment.

Public health costs are never taken into account. This is the number 2 thing for the Clinton Administration to be worried about is health care costs. Well, where is this health care crisis coming from? Toxics are not just polluting the rivers, they are killing people as well as other endangered species. They are making

people very sick. We are having to pay for that. That is something we have to take into account.

So what do you do? Is there a positive answer? Of course there is. There is an answer about sustainable harvesting of all of our natural resources, whether it is fish or trees or whatever it is. You all know far better than I do the details about how that can be done.

We just did a study at Greenpeace, which I would be happy to submit to you, on energy for employment which points to the increased level of employment with renewable energy resources than the level of employment you have with the nonrenewable energy sources. Everybody knows there is a difference between capital-intensive and labor-intensive industries. Labor-intensive industries, if you will look at farming, if you look at agriculture, are family farms, are peasant farming. They are not agribusiness. Agribusiness is mechanized, and it is chemicalized. And that is the kind of farming that this NAFTA is going to bring us; that is, decreased public health and decreased employment, and definitely decreased quality of life.

Everybody knows that and yet we are allowing this economic juggernaut to push aside all of our efforts to design a different paradigm. Development money has to be provided for infrastructure before you get into the massive development. You all must be sick and tired of coming up with money to clean up after the profits have been taken. The S & L disaster is only one of many examples of that sort of thing. This will be another one.

The border cleanup—put a dollar price on that. It will be billions of dollars already from the maquiladoras. This is going to move the maquiladoras throughout Mexico and throughout the southern United States also, by the way.

So in any case, there are ways in which we can look at it—a very different kind of development model, and we have been working very hard at that in coalition with a lot of other organizations. Mexico—at least some people in Mexico are also looking very hard at that.

Mr. HAMBURG. Thank you. I think you used up most of my time—

Ms. DUDLEY. I am sorry.

Mr. HAMBURG [continuing]. but it was well worth it. And I would just like to follow—Mr. Chairman, could I just—

Mr. STUDDS. Go ahead.

Mr. HAMBURG. Mr. Nader, I believe you were making the case or the gentlewoman to your right was making the case about state laws not prevailing under NAFTA and under GATT agreements. Could you just state that one more time so I make sure I had it right?

Mr. NADER. The architecture of these trade agreements reflects the strategy of multinational corporations to develop trade agreements that impose an autocratic structure over our laws, Federal, state, and local. In other words, there is a supremacy that attaches to these trade agreements, and although some of the lawyers have tried to adroitly use clever words to attenuate the conclusion that I have just drawn, the GATT autocracy is much more stringent than even the NAFTA. So if Mexico, for example, or Chile or Argentina, or the United States don't want to proceed under NAFTA to over-

ride a higher standard in X country, they can proceed under GATT, which is more draconian.

These trade agreements are Federal law. As Federal law, they are going to override or inhibit politically, if not strictly repeal—they are going to override other Federal laws, other state laws, and the local ordinances that come under state laws. Now, as a trade agreement—it is very hard to change a trade agreement. You can pass any statute here and revise it and repeal it and reduce its appropriations, et cetera, but the Federal law known as a trade agreement requires all the signatory countries to change with your desire to change so it is a much more inflexible Federal imposition under an international regime of dispute settlement, et cetera, that sounds almost like kangaroo courts.

The inspiration of these trade agreements is, as Barbara Dudley, pointed out—they are pull-down agreements where higher standards are dragged down to lower standards because lower standards mean lower costs for multinational corporations. They are not pull-up agreements, and what we want to see and what the detailed recommendations in our testimony page after page, which is too detailed to be summarized in this frenzied Today Show atmosphere of time curtailment—they are very specific recommendations which I hope the media will read—substantive and procedural to develop trade agreements that are pull-up so that we can help the human rights movement in South America and in Mexico, so we can help the labor people in Mexico who are trying to get democratic labor rights of organization, so we can help the citizen groups who are trying in Mexico to get enforcement of these nominally well-written laws rather than end up beaten, harassed, tortured, or disappeared. And we have to take all these considerations very, very seriously into account.

Yesterday's Washington Post editorial broke new ground for unsurpassed ignorance when it simply said to Congress, "Get this through. Don't let people pick it apart or amend it. Just get it through." Well, the Post would never say that about a 1,500 page tax bill. It would never say that about a 1,500 page pension bill, but they want to say it about an umpteen hundred page trade bill that is much more difficult for Congress to reverse and much less understandable by the American people. And all I ask you in Congress to do is simply take the way you have been legislating—when you set up marketing orders or economic stabilization laws, or UDAG or whatever, you do not put in those laws restrictions on environment, workers' safety and consumer rights. What do you do? You set up different laws. You pass auto safety laws. You pass product safety laws. You pass environmental laws, OSHA laws, so that they are relatively on a level playing field and so that you can make clear whether the ideals and values of health and safety override an agricultural subsidy or marketing order, et cetera.

In the trade agreement, the trade agreement includes and subordinates the health, safety, workers' standards, consumer and environmental areas, totally foreign to the way Congress has been legislating for the last few decades.

Mr. HAMBURG. Thank you, Mr. Nader.

Mr. STUBBS. Normally, we would pause for a commercial at this time, but I think we won't.

Mr. NADER. Well, I hope members of Congress will have town meetings in their district on this subject in the next few months. Public education is absolutely essential for a proper deliberation of this decision.

Mr. STUDDS. I think you are right, but I don't know what is more likely, a member of Congress or the public reading that thing, but we will do our best. I realize that doesn't give you much confidence. The gentlewoman from Arkansas.

Ms. LAMBERT. Just a couple of comments, and I was certainly glad to hear Ms. Dudley speak of the family farmer. They are almost extinct these days, and you are exactly right, that we as family farmers have worked hard to work within the parameters of environmental guidelines in our nation that have come a long way. We take tests. We do all that we can to know that our application is under those guidelines. There is no way that we can compete with the corporate or the industry farm either in this country or in Mexico or elsewhere, and it is going to be very critical, as I understand, that the agreement will phase out or eliminate certain commodity subsidies which will, in essence, eliminate the family farmers. And I think that that is very detrimental.

As we talk about and discuss equalizing the environmental standards between the U.S. and Mexico, your point was certainly well-taken as well, that they do not have the financial resources. And at that point, I guess I come in with Mr. Nader is are we going to go down to their standards after we have made such strides because they can't afford to come up to our standards? And it is going to be very important that we do look at it, and our districts are asking a lot of questions, and they are very interested, and they do need to be educated. And that is kind of why we are here today. So thank you very much for your insight.

Ms. DUDLEY. Thank you.

Mr. STUDDS. Let me say that, again, it is cold comfort, but this morning is tranquility incarnate compared to our normal procedures. We haven't been interrupted once. We have two and a quarter hours on the same subject, and I can't remember the last time I had that on any subject. We are running, out of deference to testimony that was extremely important, sufficiently late as to completely discombobulate the rest of our day in looking at the schedule here.

I want to say that I was worried a little bit before I came in. Now, I am much more worried. I would be absolutely panicked if the preceding Administration were still in office. My worry is tempered by my conviction that the new kids on the block do not intend to do some of the things that you fear might be done, and because of the frenetic nature of our schedule, I don't have time to prolong this as long as I would like.

Let me just make a couple of observations. I think that the input of you people especially on this panel is vital perhaps not so much to us now as to the key people in the Administration who are going to be responsible for the next step here. The next step is essentially an executive one, not a legislative one. And I certainly would offer the good offices of this committee, if they are needed, although I have a feeling that each of you has your way of expressing yourselves. But if any help is needed in putting this information in this

form from you yourselves into the appropriate hands of the Administration, we would like to be of help in that.

I guess if I could ask just one question. It is a little superficial, and I realize that, and you all are prepared to go on at length, and in a perfect world, we would be here at length. If the President and the Vice President were here now and each of you had 60 to 90 seconds on this subject with them, what would you say if you had their undivided attention for a minute or two?

Ms. DUDLEY. I will start. I would simply ask them to take a very hard look at the NAFTA and stack it up against the economic plan and their pronouncements on both the environment and public health and just pick it apart, look at the analyses that people have done, and decide whether or not it doesn't undo exactly what they are trying to accomplish with the economic plan and the public health plan.

Mr. NADER. I would advise them to go around the country the way they are on the economic plan and open up public deliberation on these international trade agreements, establish a more democratic and open process, put these volumes out in much cheaper fashion, both summary and full, all over the United States so citizens, citizen groups, labor, and others can partake in this.

And, second, I would ask them to establish in the trade agreement, not in possibly subordinate protocols, in the trade agreement itself the mechanisms that will preserve our sovereignty, our own determination of asbestos standards or toxics or auto safety standards or food standards and eliminate the reckless use of nontariff trade barriers that provide so many pages of words in these agreements. That is the key thing. Once we preserve our own ability to set our standards, then the trade agreement becomes a pull-up agreement, pulling up the standards around the world and not a pull-down agreement.

Mr. SNAPE. I would say very simply—do we have the capacity to enforce existing standards, and are the mechanisms that we are going to create truly going to achieve enforcement ends, or are they going to be somewhat cosmetic mechanisms that maybe dabble at the problem but don't get to the heart of very serious enforcement questions which still exist among all three countries?

Mr. STUDDS. Anyone else? You don't get this opportunity often. I would take it if I were you.

Mr. AUDLEY. The one message I would like to send is given the speed of interagency discussions toward the deadline of the 16th and 17th of negotiations on supplemental agreement, I would urge the President to slow down and make sure that his appointments are in place, that the key agency is involved in that discussion so that his agenda for trade, which we believe to be a more responsible agenda, is made a part of a negotiating agenda for the NAFTA negotiators.

Mr. HOUSMAN. My response would be that I would implore the President to consider that trade agreements last over the long-term. As the Chair noted, things may be different now, but there is no guarantee that that difference will continue 10, 20, or 50 years in the future. Protections cannot be implicit or politically determined but must be explicit and legally binding.

Mr. STUDDS. Thank you. Last shot anyone? Yes, sir.

Mr. FATEMI. I would make two suggestions to them. One, as Mr. Nader pointed out, I think that more dialog is needed in the international trade area arena. Very little has been done in that sense. Secondly, I would recommend that NAFTA be looked at in its entirety. If it is good for the U.S. as a unit, it should be approved. If not, it should be thrown away. I don't think it should be sort of detracted from by two side agreements and parallel agreements. That doesn't do it any good. Thank you.

Mr. STUDDS. I want to thank each of you. You bring a very special perspective of expertise of your own. You have sounded a very effective alarm—I guess I should say an alarming alarm, and we will do our very best to respond appropriately. We thank you, and the subcommittee is adjourned.

[Whereupon, at 12:33 p.m., the subcommittee was adjourned, and the following was submitted for the record:]

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U.S. House of Representatives Committee on

Merchant Marine and Fisheries

Room 1334, Longworth House Office Building
 Washington, DC 20515-6230

March 3, 1993

BACKGROUND MEMORANDUM

TO: MEMBERS, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

FROM: SUBCOMMITTEE STAFF

DATE: MARCH 3, 1993

RE: THE IMPACTS OF TRADE AGREEMENTS ON U.S. ENVIRONMENTAL
 PROTECTION AND NATURAL RESOURCE CONSERVATION EFFORTS

On Wednesday, March 10, 1993, at 10:00 a.m. in 1334 Longworth House Office Building, the Subcommittee on Environment and Natural Resources will conduct a hearing on the impacts of trade agreements on U.S. environmental protection and natural resource conservation efforts.

The witnesses will be Ambassador Rufus Yerxa, Deputy U.S. Trade Representative; Mr. John Turner, Director, U.S. Fish and Wildlife Service; Mr. John Audley, Trade Analyst, Sierra Club; Mr. Ralph Nader, Public Citizen; Mr. Robert Housman, Attorney, Center for International Environmental Law; Ms. Barbara Dudley, Executive Director, Greenpeace; Mr. William Snape, Associate Counsel, Defenders of Wildlife; and Dr. Khosrow Fatemi, Dean, Laredo State University.

Background

The U.S. is currently involved in two rounds of trade negotiations. One updates the General Agreement on Tariffs and Trade (GATT); the other is the North American Free Trade Agreement (NAFTA). Recent GATT challenges to the U.S. Marine Mammal Protection Act (MMPA) have generated serious concerns among environmental and consumer protection groups regarding the potential impacts of trade agreements, including the NAFTA, on U.S. efforts to protect the environment and conserve exhaustible natural resources.

The crux of the issue before the Subcommittee is the growing conflict between (1) domestic programs for conserving natural resources, which are enhanced through trade sanctions, and (2) increasing global efforts to promote free trade. While the objective of trade agreements is the elimination of barriers to trade, conservation and consumer action groups believe that the leverage of potential import sanctions assists the U.S. in encouraging protection of natural resources domestically and internationally. Historically, trade agreements have not recognized the relationship between trade and environmental protection. The challenge is to define those relationships, and to determine how best to mesh free trade with other domestic policy programs.

A number of laws or international agreements under the Committee's jurisdiction contain trade provisions --

- o The Marine Mammal Protection Act (MMPA) requires the embargo of "commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards". (16 U.S.C. 1371).

- o The Magnuson Fishery Conservation and Management Act requires the prohibition of imports of all fish and fish products from a nation which does not allow U.S. fishing vessels "equitable access to fisheries over which that nation asserts exclusive fishery management authority" if that nation has failed to commence negotiations, or to negotiate in good faith, with the U.S. on an international fishery agreement. (16 U.S.C. 1825).

- o The Pelly Amendment to the Fishermen's Protective Act of 1967 allows the embargo of any products from a country whose nationals are "conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program" or wildlife products from a country whose nationals are "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species". (22 U.S.C. 1978 et seq.).

- o Public Law 102-162 prohibits the importation of shrimp or shrimp products harvested with commercial fishing technology which adversely affects the conservation of endangered sea turtles. (16 U.S.C. 1537).

- o The High Seas Driftnet Fisheries Enforcement Act, enacted in November of 1992, requires a ban on the importation of fish, fish products, and sport fishing equipment from those nations "whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation" after January of 1993. (16 U.S.C. 1822).

- o The Convention on International Trade in Endangered Species of Fauna and Flora (CITES) prohibits trade in species identified by the Convention as endangered, and limits trade in threatened species. CITES implementing legislation is contained in the Endangered Species Act. (16 U.S.C. 1537).

o The African Elephant Conservation Act requires a moratorium on the importation of ivory from ivory-producing countries that are not parties to CITES, and from those that do not have effective elephant conservation programs. (16 U.S.C. 4221).

o The Wild Bird Conservation Act prohibits the importation of any exotic bird considered threatened under CITES unless the exporting nation has an adequate wild bird conservation program. The Act also allows an embargo on the importation of bird species that the U.S. considers to be threatened but are not listed under CITES. (16 U.S.C. 4904-4905).

Effects of the GATT Tuna/Dolphin Case

The U.S. is a member of the General Agreement on Tariffs and Trade (GATT), an international agreement whose purpose is to foster global free trade among its 108 member nations (parties). The GATT was created in 1947, when few nations had significant environmental laws and there were few international environmental agreements. Today, international trade has increased dramatically, and environmental protection has become a global issue. While the GATT has facilitated global free trade, historically it has not considered trade's impacts on the global environment.

The GATT's Secretariat, based in Geneva, hears challenges from the parties on claims regarding unfair trade practices. It was such a challenge, brought by Mexico against U.S. marine mammal protection laws in 1991, that raised concerns among environmentalists, consumer protection groups, and the Congress regarding the GATT's ability to interfere with domestic laws. This challenge to the tuna/dolphin provisions of the Marine Mammal Protection Act proved to be the first major trade battle in the larger conflict between free trade requirements and natural resource conservation.

In 1984, growing concern over the number of dolphins killed during tuna purse seine operations in the eastern tropical Pacific Ocean resulted in amendments to the MMPA requiring that each nation exporting tuna to the U.S. document that it had adopted a dolphin conservation program equivalent to that of the U.S., and that the average rate of mortality of its purse seine fleet was comparable to that of the U.S. fleet. If these requirements were not met, an embargo on the import of yellowfin tuna and tuna products from that nation would be invoked. In 1988, the MMPA was further amended by providing more specific comparability standards and by requiring the government of any "intermediary" nation from which yellowfin tuna would be exported to the U.S. to provide reasonable proof that it has acted to prohibit the importation of yellowfin tuna from embargoed nations. Lack of such proof results in an embargo of tuna from the intermediary nation as well (secondary embargo).

In 1990, Mexico's yellowfin tuna was embargoed under the comparability provisions. In accordance with GATT procedures, Mexico challenged the U.S. embargo, claiming it to be an unfair trade practice. In September 1991, a GATT dispute panel issued a preliminary report

supporting Mexico's challenge. [Since that time, the panel report has been awaiting action by the full GATT member council. Action has been delayed since current GATT procedures require that all 108 parties must agree to bring a panel report before the full council, and Mexico and the U.S. have been attempting to resolve the issue through bilateral negotiations.] In addition, the European Community brought a similar GATT challenge against the U.S. in 1992, protesting the secondary embargo provisions.

The following two reasons given by the GATT panel in support of Mexico's challenge raised serious concerns about the GATT's possible impacts on other U.S. laws.

- 1) Trade sanctions cannot be imposed upon a product based on its method of production i.e., killing dolphins during tuna fishing operations. (Implications for other laws: prohibiting shrimp imports under P.L.102-162; prohibiting fish imports under the Driftnet Act.)
- 2) Trade sanctions cannot be imposed to conserve exhaustible natural resources outside of a party's territorial jurisdiction; i.e. in the "global commons" or within another party's territory. (Implications for other laws: prohibiting fish imports under the Magnuson Act; prohibiting ivory imports under the Elephant Act; prohibiting bird imports under the Wild Bird Act.)

GATT Concerns

Both the substance of the GATT agreement and GATT procedures have raised concerns.

Procedures

The GATT dispute resolution process takes place in Geneva. The dispute resolution panel is chosen by the GATT Secretariat, and makes its decision based on briefs filed by the disputing parties. After the publication of the panel's decision, the disputing parties have several options for resolution. Two of the most likely resolution processes follow.

- (1) The disputing parties negotiate a bilateral resolution. This is the most common form of GATT dispute resolution, and may occur even before a panel report is published. The challenging party withdraws its challenge, the party being challenged withdraws the trade action, or the two seek a compromise solution.
- (2) The disputing parties agree to bring the panel report before the entire GATT council. If the report has supported the challenging party, and is accepted by the full council, the challenged party is required to withdraw the trade action.

If an agreement cannot be reached, or if the issue cannot be resolved by either of the above methods, the challenging party may retaliate with its own trade actions. For example, the "injured" party may levy a tariff on products exported by the "guilty" party.

The dispute resolution process has raised questions regarding national sovereignty: if the GATT council supports a challenged trade action, reversal of the trade action may require a change in domestic law. This is the case with the Mexican challenge of the MMPA, and would apply to most of the trade-related laws under the Committee's jurisdiction.

The relative secrecy of the dispute settlement process has also raised serious concerns in the U.S. regarding public access. Consumer action and environmental organizations have campaigned heavily for more "transparency" in both the GATT and NAFTA dispute resolution processes.

Substance of the GATT

The finding of the GATT tuna/dolphin dispute panel sets a precedent by which other nations may find it easier to challenge U.S. environmental and consumer protection laws. Some environmental organizations believe that domestic laws regulating everything from trade in endangered species to fisheries conservation could be challenged. Consumer protection groups are concerned about U.S. laws regulating pesticide use on imported agricultural products. Until these laws are actually challenged as unfair trade practices, the overall impact of the tuna/dolphin case remains uncertain. As noted previously, the GATT traditionally has been fairly blind to environmental concerns (the word "environment" appears nowhere in the GATT text), and environmental groups fear that any challenges to domestic conservation laws -- either state or federal -- are likely to be upheld.

The implications for international conservation agreements are also uncertain. Some experts argue that conservation treaties take precedence over GATT rights; others claim that the most recently signed international agreement -- whether a conservation treaty or the latest round of GATT talks -- takes precedence. Still others believe that GATT parties who are not signatories to a conservation treaty could challenge that treaty's trade actions as unfair trade practice. Again, until such a challenge occurs, the results remain speculative.

The U.S. and the other GATT parties are currently involved in a set of negotiations, called the Uruguay Round, aimed at updating the GATT. The Uruguay Round provisions do not address consumer protection or conservation concerns, and non-government groups are urging that the U.S. reject any Uruguay Round that does not make some effort to "green" the GATT. The Clinton Administration has not yet set a timetable for completion of these negotiations.

Environmental Issues of the NAFTA

Since the NAFTA text was initialed by President Bush, President Salinas and Prime Minister Mulroney last year, environmental organizations and some members of Congress have expressed concerns

about the NAFTA's possible impacts on the environment. In response, President Clinton, while renewing the U.S. commitment to the NAFTA, has also stated that he intends to negotiate an environmental "side agreement", or protocol, prior to bringing implementing legislation for NAFTA before the Congress. U.S. Trade Representative Mickey Kantor will begin negotiations with the Mexican government on the environmental protocol the week of March 15.

Maquiladora region

Attention to Mexican environmental concerns has focused largely on the maquiladora area along the U.S.-Mexican border. Environmentalists charge that U.S. industries have located operations in the maquiladora region to take advantage of cheap Mexican labor and lax enforcement of Mexican environmental law; products are then shipped back to the U.S. To substantiate these claims, environmental groups have documented open drainage ditches containing raw human sewage and toxic effluent from industrial plants, along with consistent violations of Mexican air pollution control regulations. They fear that a free trade agreement will provide additional incentive for industries to escape U.S. environmental standards.

It has been estimated that cleanup of the maquiladora area will cost the two nations \$5-12 billion. Environmental groups are urging that a dedicated fund be established for cleanup. The same fund could support training of Mexican inspectors and enforcement officers. One proposed source of revenue for the fund is a "transaction fee" of anywhere from .5-2% on the value of all products or services crossing the border. Some businesses have responded that a transaction fee would undermine the free trade objectives of the NAFTA.

NAFTA proponents contend that the successful implementation of the trade agreement will eliminate the incentive for industries to operate within the maquiladora area by opening all of Mexico to U.S. investment. They also point out that Mexico has strong environmental protection laws, and has recently taken strong actions to enforce those laws along the border and in Mexico City.

Wildlife Protection

The border area contains sensitive habitat for several endangered species, as well as wetland areas. The U.S. Fish and Wildlife Service has expressed concerns regarding the impact of increased cross-border traffic on these areas and species. Currently, no infrastructure plan for cross-border roads and bridges exists which takes endangered species and protected habitats into account.

In addition, NAFTA's impacts on existing U.S. wildlife protection laws remain unclear. Mexico appears to have backed away from its commitment to enter into a moratorium on the practice of setting nets on dolphins during tuna purse seine operations, as provided for in the International Dolphin Conservation Act of 1992. Environmentalists claim that this action only reinforces skepticism about Mexico's environmental commitment. The Wild Bird Conservation Act and laws protecting sea turtles from mortalities during shrimping operations both contain trade sanctions and also have the potential for direct conflict with Mexico.

International environmental agreements

As the NAFTA text is currently written, only three international environmental agreements clearly supercede NAFTA: CITES, the Montreal Protocol (controlling sulfur dioxide and other acid-rain causing emissions), and the Basel Convention (controlling exports of hazardous wastes). The relationship of the NAFTA to other international agreements -- particularly if they contain provisions which could restrict trade -- remains unclear.

Dispute settlement

An issue of major concern regarding environmental issues and the NAFTA is the lack of transparency, or openness, in the dispute settlement process. Like the GATT, dispute settlement under NAFTA does not provide for public or Congressional involvement. Environmental and consumer protection organizations have urged the establishment of advisory panels consisting of non-governmental environmental experts to assist in environmental dispute resolution.

North American Commission on the Environment

President Clinton has suggested the formation of a trilateral commission which would monitor NAFTA-related actions. Environmental and consumer groups, along with some Members of Congress, support the concept, and have proposed establishing a North American Commission on the Environment (NACE).

Generally, environmental groups agree that Mexico has adequate environmental protection laws, but traditionally has not enforced them. It has been proposed that NACE's functions should include monitoring the NAFTA parties' implementation and enforcement of environmental regulations and environmental dispute resolutions. The level of enforcement powers accorded to NACE remains under debate. It has been suggested that NACE consist of government representatives from the environmental agencies of all three NAFTA parties as well as non-governmental environmental experts and business representatives.

Issues

NAFTA Side Agreements

The Administration has announced its intention to negotiate an environmental side agreement to the NAFTA, and U.S. Trade Representative Mickey Kantor will begin negotiations with his Mexican counterparts the week of March 15. What details should be contained in a side agreement? How will an environmental side agreement be dealt with in the Fast Track context?

How should a North American Commission on the Environment be structured? Who should be represented on the Commission? How extensive should its powers be?

NAFTA Funding

A source of funding is needed for environmental cleanup along the border area, training of enforcement officers, and infrastructure

requirements. Can a dedicated source of funds be found through a border transaction fee? What effect might such a fee have on cross-border business?

Impact of trade agreements on U.S. federal and state laws

In cases where a state has more stringent regulations regarding product imports than the federal standard, does the GATT or the NAFTA pre-empt state law? Can a NAFTA or GATT party challenge state laws as unfair trade practices?

If a trade dispute resolution panel finds that a federal or state law is in violation of GATT or NAFTA provisions, what are the consequences if that law remains unchanged? For example, can Mexico impose retaliatory trade sanctions against a state?

Dispute settlement

How can the GATT and NAFTA dispute settlement processes be amended to provide more public access and/or Congressional participation? What role should the public play in this process?

U.S. business

What role can U.S. businesses play in assisting Mexico's environmental protection efforts? In the environmental aspects of other trade agreements?

Other international agreements

What role does Agenda 21, agreed to by 120 nations at the Earth Summit, play in bringing environmental concerns into the GATT?

How could the GATT affect the enforcement of other international agreements or forums, such as the International Commission for the Conservation of Atlantic Tunas (ICCAT), or the International Whaling Commission?

STATEMENT OF AMBASSADOR RUFUS YERXA
DEPUTY UNITED STATES TRADE REPRESENTATIVE
BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman, I am pleased to be here today to discuss the proposed North American Free Trade Agreement (NAFTA) and the environment.

President Clinton has stated that he supports the NAFTA as an element in our overall economic policy. Its market opening provisions have the potential to strengthen the U.S. economy and create high paying jobs. However, to reach these goals, the NAFTA must be accompanied by the right domestic policies and supplemented by additional domestic actions and agreements to address concerns regarding the environment and labor.

On both the domestic and international fronts, we intend to address environmental and labor concerns in a concrete and comprehensive fashion. Doing so does not mean reopening the NAFTA, but rather supplementing the NAFTA's provisions so that its promise can be realized.

On March 17-18 I will lead the first round of negotiations aimed at reaching a supplemental agreement on the environment. My team will include officials from the Environmental Protection Agency, the Department of the Interior, the Department of Commerce, and the Department of State. My Mexican and Canadian

counterparts, Herminio Blanco Mendoza and John Weekes, will lead their teams with representatives from appropriate environmental agencies.

We will pursue these negotiations vigorously, but let me assure you that we will not forsake substance for speed nor let an artificial timetable drive our efforts. As President Clinton and Ambassador Kantor have said, we will not ask you to vote on NAFTA implementing legislation until these negotiations result in a solid agreement.

We want the environmental agreement to have mechanisms and provisions to help raise standards where they are deficient, strengthen national enforcement of national laws, improve the U.S.-Mexico border environment, and ensure that the NAFTA promotes sustainable development in all three countries.

I am optimistic that we can achieve these goals. As you know, Mexico has solid environmental laws and standards on its books, and President Salinas has repeatedly recognized the need for strengthened enforcement. His government has increased the level of resources and manpower dedicated to environmental protection, but resources remain scarce.

I see the environmental agreement covering three basic areas:

- improved cooperation on environmental safeguards, including technical assistance, and data sharing, with a goal of attaining the best protections possible;
- improving enforcement of standards and national laws, both through the administrative and judicial processes of each country, and new environmental commissions which will provide independent review of measures taken to enforce national laws; and
- encouraging a positive impact of the NAFTA on North America's environment.

In the area of cooperation on environmental safeguards, the United States has active programs with both Mexico and Canada on which we will build. Other agencies have primary responsibility for these programs, but let me summarize a few points. The 1992-94 U.S.-Mexico Border Plan was a good first step aimed at reducing pollution and enhancing understanding of the fragile border environment. EPA and other appropriate U.S. agencies will be working with Mexican authorities to identify priority activities for a second phase of the plan. Similarly, the Department of the Interior, the National Marine Fisheries Service, the Agency for International Development and the U.S. Forest Service all have cooperative programs with Mexico to promote conservation or safeguard endangered species and their habitats.

In the area of enforcement of standards and national laws, these negotiations will be breaking new ground for the United States and for our continent. We think that the new commission could have an important role in exposing problems and pressing for remedies, but we are also looking at ideas such as improving local enforcement processes (a method used to improve enforcement in the intellectual property chapter of the NAFTA).

In this effort, we want to promote the strongest possible improvements. At the same time, we have to bear in mind that the agreements will apply to us as well as to our neighbors. We will therefore want our agreement to be compatible with the various juridical and administrative ways we enforce laws. My staff and I will be looking to the Congress, to government enforcement officials, and to our experts in the environmental community to find ways to address these problems as the negotiations progress.

As you are aware, the proposed NAFTA includes a number of provisions that mark a significant advance in the treatment of environmental issues in a trade agreement. The supplemental agreement on the environment can help promote a still more positive relationship between the NAFTA and the environment. I would expect an environmental commission first to facilitate implementation of NAFTA's environmental provisions by reporting regularly and publicly on the extent to which the parties are meeting the NAFTA's environmental objectives. We would also

expect the commission to assist in the implementation of certain environment-related NAFTA provisions.

At the same time, USTR, along with OMB, Treasury, Labor and EPA, will be studying the various options for funding critical environmental cleanup efforts.

I look forward to the support and guidance of this committee in meeting our goals to negotiate a good supplemental environmental agreement aimed at promoting sustainable development and enhanced environmental protections in North America.

March 10, 1993

STATEMENT OF JOHN TURNER, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES, REGARDING ENVIRONMENTAL ASPECTS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

March 10, 1993

Mr. Chairman, I am John Turner, Director, United States Fish and Wildlife Service, Department of the Interior. I am pleased to be here today to discuss environmental aspects of the proposed North American Free Trade Agreement (NAFTA), particularly as they affect the resources within the jurisdiction of the Department of the Interior.

In 1992, the Environmental Protection Agency and its Mexican counterpart, the Secretaria de Desarrollo Social, prepared the first phase (1992-1994) of an Integrated Environmental Plan for the border area to address various issues, including industrial pollution, wastewater, hazardous substances and related matters as they affect human health or the environment. In my testimony today I want to focus on another aspect of the environment -- fish, wildlife and habitat resources along the border and within Mexico.

The Department of the Interior has a long history of cooperative efforts with our counterparts in Mexico. We are the largest land manager along our common border, as about 13% of the border area is within National Parks and 8 National Wildlife Refuges comprising over 1,000,000 acres are along or adjacent to it. The

Bureau of Land Management also oversees a strip of land about 60 feet wide along much of the land border, as well as managing large areas of adjacent public lands.

For over 50 years we have cooperated with our Mexican counterparts on shared species and habitat protection, wetlands management, mapping, and recreational planning. Our common heritage has led to programs of cultural and historic exchanges, and increasing trade has resulted in the sharing of information about techniques for mineral extraction and decreasing the environmental impacts of our projects. The Department currently has eight active Memoranda of Understanding, and 67 specific joint projects, with our Mexican counterparts, mostly through the Fish and Wildlife Service and the National Park Service.

Our history of cooperation in fish and wildlife management and research with Mexico dates back to the Migratory Bird Treaty with Mexico in 1936. Since 1974, agencies in both countries have implemented a comprehensive program of cooperation through the Joint Committee on Wildlife and Plant Conservation. Conservation projects in the fields of training, protected areas management, endangered species and migratory birds have been implemented throughout Mexico as a result. The 1988 Tripartite Agreement for the Conservation of Wetlands, funded through the North American Wetlands Conservation Act written by this Committee, is now generating similar benefits.

NAFTA represents a significant new opportunity to promote environmental conservation in Mexico and along the border. NAFTA itself is expected to raise standards of living in Mexico, which should help reduce pollution and increase attention to environmental quality. In addition, President Clinton has called for negotiation of a side agreement to ensure sound environmental protection under NAFTA. We expect the increased trade and development opportunities stemming from NAFTA will produce environmental impacts that will need to be managed effectively to ensure continued progress in fish and wildlife conservation in the U.S. and in Mexico. The major issues to be addressed are law enforcement activities, protection of endangered species, and management of fisheries, wildlife refuges and wildlife habitat generally along the border.

The Fish and Wildlife Service has the responsibility for ensuring that wildlife and wildlife products entering the United States are in compliance with Federal, State laws, and international treaties, including the Endangered Species Act and the Convention on International Trade in Endangered and Threatened Species of Flora and Fauna (CITES). Service wildlife inspectors are currently stationed at various ports of entry around the country to inspect wildlife shipments, with emphasis on 10 "designated" wildlife ports of entry. As a result of increased trade flows and the development of new border crossings, we anticipate an increase in wildlife traffic across the border.

Illegal trade in wildlife and wildlife products still exists between the United States and Mexico. The effects of this trade are reflected throughout Mexico as fish, wildlife and plant populations, many of them threatened or endangered, decrease due to collecting pressures. Mexico became a party to CITES in 1991, and is currently working to fully implement its provisions, but needs additional trained personnel. Without additional enforcement resources on the United States side of the border, and technical assistance to Mexico, the present illegal wildlife traffic is anticipated to continue or increase, with potentially serious adverse effects on many species.

There are also habitat protection concerns in and around the border area. Thirty-seven Federally listed and 158 candidate species of animals and plants occur within the first tier of counties bordering the Rio Grande from Maverick County, Texas, to the Gulf of Mexico. Along the New Mexico/Mexico border, 12 Federally listed wildlife species, 1 proposed species (Mexican spotted owl), and 45 candidate species occur.

Twenty Federally listed, one proposed, and 83 candidate species of animals and plants occur within 25 miles north of the Arizona-Mexico border. Along the California-Mexico border there are presently 13 endangered and threatened listed species, and at least 90 proposed or candidate species. In addition, the California condor, now the subject of an intensive recovery

action, formerly occurred in Baja California, Mexico.

In what is primarily an arid or semi-arid region with a fragile ecosystem, potential changes in land use need to be carefully managed. The increased flow of goods between the U.S. and Mexico under NAFTA will generate pressure to expand the infrastructure necessary for transportation, customs, and other related services. For example, already a number of new bridges over the Rio Grande have been proposed between the Gulf of Mexico and Del Rio, Texas. Pursuant to two Executive Orders (E.O. 11423 and 12114), as well as the National Environmental Policy Act, the United States evaluates the environmental impacts of proposed development. Each bridge and its approaches have the potential to destroy habitat, multiply human presence, and affect the management of State and Federal refuges. For this reason, the new bridge proposals are subject to environmental review before the Department of State and the Coast Guard issue the required permits.

Population growth and development is also anticipated. In Arizona, the City of Nogales and Santa Cruz County have advised that they expect expansion of industrial park areas along the Santa Cruz River, which borders Interstate 19 as it connects Nogales to Tucson and Phoenix to the north. The Yuma area, located along the lower Colorado River, expects expansion associated with the Free Trade Agreement. This border area on

the lower Colorado River serves as an important component of the Imperial, Cibola and Havasu National Wildlife Refuges management program for various waterfowl, neotropical migratory birds, endangered species, sport fisheries and other wildlife. Once again, care should be taken to keep the effects on wildlife and habitat to a minimum.

However, there are also opportunities arising from these activities. Nogales and Santa Cruz County representatives have requested that we assist them in establishing a protective riparian greenbelt directly adjacent to the Santa Cruz River in the flood-prone, aquifer recharge zone, thus ensuring that the Greater Nogales area can expand both for expected free trade agreement economies as well as the increasing tourist-based economies. By protecting these unique habitats, recovery may be achievable for certain federally listed endangered species, such as the Aplomado falcon and desert fishes, as well as avoiding the need to list some candidate species.

Wildlife knows no borders. Habitat corridors need to be established in the U.S. and Mexico to generate the much needed "safe passage" for migratory, as well as non-migratory wildlife species. Anchor refuges of sufficient size to provide for wildlife needs and biodiversity need to be established in both countries. This would include re-visiting with vigor and resolution previous discussions and efforts between the U.S. and

Mexico to establish International Reserves.

Preservation of wetlands along the Rio Grande border should also carry a high priority. Floodway channel maintenance is an authorized responsibility of the International Boundary and Water Commission (IBWC) that must continue, and an accomodation on flood control versus riparian habitat has been worked out between the IBWC and the Service on the lower Rio Grande. This recent initiative should demonstrate the feasibility of conserving the riparian resource along the border.

The Fish and Wildlife Service is working on a draft plan to address these issues.

You have asked that we address the details of an environmental supplemental agreement as well. The Administration is currently formulating its position as to what should be contained in such an agreement, and I am not in a position today to say what the final document will look like.

The Department of the Interior is committed to being an active participant in the process, and we take very seriously our responsibilities to protect the resources under our jurisdiction along the border. To this end, Secretary Babbitt has created a Departmental task force to coordinate all of our activities on this issue.

You also asked that we address the question of enforcement of NAFTA environmental and wildlife agreements. Although this specific question is still under consideration, so that I cannot comment on it at this time, there are other related enforcement issues that may be of interest. One major constraint on the implementation of strategies for the sustainable use of Mexico's resources is the scarcity of personnel adequately trained in biodiversity and resource management. Although Mexico has various high quality institutions generating professionals in many disciplines, it does not have a graduate program specifically oriented toward wildlife and biodiversity management.

Mexico's cadre of resource managers could usefully be strengthened in order to address the need to develop management practices that deal comprehensively with potentially competing land requirements for biodiversity conservation, agriculture, industry, transport and other vital societal needs. This would require formal professional-level training. Formal training in biodiversity/resource management is essential for building and strengthening the capacity of a nation to manage its resources sustainably.

Public outreach and environmental education are fundamental to the success of all of Mexico's conservation initiatives. This is because Mexico recognizes that it is the attitudes of people that

determine the success or failure of any specific program. As Mexico's population grows, environmental education and public awareness become evermore critical for promoting attitudes and behaviors consistent with the sustainable utilization of resources, and for fostering public participation in decision-making. Mexico is beginning to expand its efforts at public outreach, but its resources may be limited.

One avenue for expanding public participation would be to coordinate with Mexican authorities on wildlife and plants through the existing mechanisms of the U.S.-Mexico Joint Committee for the Conservation of Wildlife and Plants. The Service has experience funding this type of activity in Mexico, and has mechanisms in place for coordination with Mexican authorities.

Lastly, you asked that we address opportunities for public participation and the role of the National Environmental Policy Act (NEPA) in the environmental agreement negotiations. This issue is under litigation and I am therefore unable to address it at this time.

Mr. Chairman, this concludes my statement. I would be pleased to respond to questions.

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TESTIMONY OF JOHN J. AUDLEY
PROGRAM DIRECTOR FOR
TRADE AND THE ENVIRONMENT
SIERRA CLUB INTERNATIONAL PROGRAM

BEFORE THE HOUSE OF REPRESENTATIVES
MERCHANT MARINE AND FISHERIES COMMITTEE

on the

IMPACT OF TRADE AGREEMENTS ON UNITED STATES ENVIRONMENTAL
PROTECTION AND NATURAL RESOURCE CONSERVATION EFFORTS

MARCH 10, 1993

"When we try to pick out anything by itself, we find it hitched to everything else in the universe." *John Muir*
National Headquarters: 730 Polk Street, San Francisco, California 94109 (415) 776-2211

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"Environmental degradation is an iatrogenic disease induced by the economic physicians who attempt to treat the basic sickness of unlimited wants by prescribing unlimited production"

Herman Daly

"... any move to impose unilaterally special duties on imports of goods and services produced in countries with less strict environmental standards is likely to be very divisive for the multilateral trading system. Where is the line to be drawn if the competitive implications of differences in so many government policies are to become a source of demands for the neutralization of the consequences for trade?"

Arthur Dunkel, GATT Director General

Among the policy objectives facing government today, two objectives; protecting the global environment and building sustainable economies; stand out in terms of their importance. Because we know so little about the environmental costs of high consumption, technology-based living standards, environmental protection is more important today than ever before. But of one thing we are certain; human poverty is one of the environment's worst enemy. So while we work to protect the environment we must also work to create jobs which enable people to provide for themselves and for families.

Increasingly national governments look to liberalized trade regimes as a means of creating jobs. But increased trade expands the scale of human activity, and therefore has uncertain environmental effects. It is, therefore, not surprising that within the arena of trade treaty negotiations a conflict between the goals of greater environmental protection and greater economic activity has arisen. Understanding the context in which this conflict takes place will be the focus of my presentation to the House Committee on Merchant Marines and Fisheries today.

I will first examine the historical relationship between trade rules and environmental principles. Then I will discuss how this conflict is being played out in three important political arenas: negotiations to complete the Uruguay Round of the General Agreements on Tariffs and Trade (UR-GATT) and the

North American Free Trade Agreement (NAFTA), plus the policy discussions to link trade and the environment currently underway at the Organization for Economic Cooperation and Development (OECD). I will conclude with some policy recommendations designed to achieve a balance between trade and environmental goals.

There are two important lessons to be learned from this brief history. The first is obvious but is nonetheless important to state: The relationship between trade and the environment is extremely complicated. It extends beyond trade and environmental policy and touches the cultures, values, and dreams of communities and nations around the world. Therefore legislators should not look toward a single trade or an environmental agreement as a solution to all the worlds economic or ecological problems.

The second lesson is that the debate between these two issues is shaped in terms of trade first, and the environment second. Environmental goals must learn to navigate through principles of economic growth and comparative advantage, not the other way around. Real solutions to the conflicts between "trade and the environment" lie in examining the entire set of circumstances that pit these two issues against each other. At the very least environmental concerns must be placed on par with the demands of ever growing economies, and we must begin to discipline our consumption demands to alleviate the pressure to produce more and more goods.

1. RELATIONSHIP BETWEEN TRADE AND THE ENVIRONMENT

Tuna/Dolphin as a Metaphor for the Conflict

When the GATT panel determined that the portions of the 1972 Marine Mammal Protection Act¹ were inconsistent with the principles of trade (and therefore "illegal"), a firestorm of attention reigned down upon the trade community. Still unresolved, the "Tuna/Dolphin" Case² acts as a metaphor which captures the debate between trade rules and environmental goals.

The conflict between trade rule and environmental goals in Tuna/Dolphin are shaped first and foremost by the objectives of trade. Under what circumstances are efforts to protect the environment legitimate constraints to trade? For the Tuna/Dolphin case, the answer is that domestic unilateral legislation which extends beyond the national boundaries of countries are not legitimate constraints to trade. Nor are policies which focus on the process by which products are made. Other GATT dispute cases further constrain the arena of environmental protection within the desires of trade³, and still others wait silently on the horizon⁴. What this body of trade dispute law reveals is that, in today's economic climate the interests of trade can and do take precedence over concern for the environment.

History of Trade and Environment

The recent focus on environmental laws is largely due to the use of "non-tariff" barriers; legislation which on the surface may not appear to be an effort to block market access, but which in fact have the same effect. The Tuna/Dolphin case is not about direct tariffs on trade, but is about how an environmental law can have an indirect effect. For more than twenty years trade advocates have worked toward the elimination of these non-tariff barriers, a goal they hope to finally achieve in the UR-GATT⁵.

The focus on environmental regulations as non-tariff barriers to trade is of great concern to environmentalists for two reasons. Most U.S., and many international environmental conventions were not written to stand the kind of economic tests now used by trade advocates to challenge their legitimacy. To meet these new tests of "least trade restrictive", or "based upon incontrovertible scientific evidence"⁶ would require serious re-working of an entire body of environmental law. Second, in many instances environmental regulations purposely use direct and indirect trade constraints to achieve an environmental goal. The United States-European Community dispute surrounding "hormone-fed" beef is an excellent example. The EC argues that such beef is harmful to consumers, and has prohibited its sale. In this example, trade prohibition of a product is the vehicle by which an environmental goal is achieved. "The Canadian Malted Beverage Case" is an example of indirect legislative impact on trade. Canada was charged by the United States for "unfair trade practices" because of a law enacted which levies a surcharge on beverages sold in aluminum. Most beer sold by Canadian breweries is sold in bottles, and is therefore, immune to this law. U.S. breweries felt that the legislation unfairly focused on foreign producers⁷.

This recent criticism of environmental laws by trade advocates has resulted in the general perception that environmental rules have suddenly and unfairly encroached upon the world of trade agreements. Nothing is further from the truth. As early as the late 19th century, nations used international conventions to protect wild birds and other species, and preserve natural resources⁸. These international conventions often used commercial restraints as a means of achieving the environmental goal. Even earlier national governments used domestic legislation to protect their own environmental

interests, often with strong economic consequences. Little attention was paid to these international conventions, however, as only a small portion of trade was actually effected by them. It wasn't until traders recognized that efforts to reduce global warming or protect bio-diversity might threaten trade patterns that such serious attention was directed at environmental laws.

An alarm highlighting the way trade rules promote environmental degradation was sounded in 1987 when Norway's Gro Harlem Brundtland sponsored the World Commission on Environment and Development to develop a "global agenda for change". In the now famous "Brundtland Commission Report", the Commission outlined an ambitious plan to link economic growth with environmental protection to promote a high quality of life for peoples in all countries⁹. As part of their mandate the Commission urged global trade institutions like the GATT to recognize the effect of expanding trade on the environment and modify their rules to be sensitive to environmental goals.

The Brundtland Report compelled trade advocates to examine the potential threat that national and global environmental laws posed for trade. The GATT identified 17 different international agreements with trade implications, and currently only recognizes one agreement: the "Montreal Protocol on the Reduction in the Use of Ozone Depleting Substances" as a legitimate constraint to trade¹⁰. International trading bodies routinely examine the domestic laws of the U.S. to expose those they feel unfairly blocks trade¹¹.

The debate between environment and trade goals has surfaced in a number of multi-national institutional fora. Within that arena tremendous pressure is directed against the environmental community to accept these new trade disciplines. I will discuss these and other fora in a moment. However, to develop a better understanding of how strong the differences between

environment and trade advocates are, I will explore the philosophical differences between these two communities.

The Different Cultures: Trade and the Environment

At a recent meeting of trade and environmental advocates, University of Minnesota professor Robert Hudec discussed the different "cultures" within the trade and environment communities. Both use specialized language that connotes a particular understanding and appreciation of issues. Deeper examination of the language of both communities reveals some fundamental differences which exist regarding their attitudes toward economic growth, the role of the markets, and their understanding of the term efficiency. I will examine each in turn.

1) Growth versus Development

Since the end of World War II economists have argued that the best way to increase overall human welfare was to expand economies through liberalized trade policy. Expanding economies through trade is founded upon the belief that increases in the overall level of economic activity generate greater levels of both personal and private wealth¹². More economic activity generates more opportunities for people to earn an income.

Trade advocates believe that this principle applies directly to environmental protection. Economic growth generates more resources which can be used to address existing environmental problems. As expressed by Arthur Dunkel, Director General of GATT, "...the increases in per capita income - which are boosted by increased market access and expanding trade - provide more resources to contain environmental damage, help to finance pollution control and remedial clean-up"¹³.

Environmentalists are not convinced by the logic presented by Dunkel for two reasons. The first reason is biological. Economic growth assumes that our macro-economy operates as a closed, circular flow system. This circular pattern assumes that production equals consumption; nothing is wasted or inconsumable in the process. This isolated system has no dependence upon any external variables, such as limited natural resources or the effects of human activity on the environment. Natural resource depletion or degradation is assumed away as not an issue, either because the resources are (practically speaking) unlimited, or that existing environmental problems will be corrected by future technological innovations¹⁴.

Environmentalists instead argue that natural resources are limited. Neither technological advances nor substitute materials can correct the impact of too much human activity on the environment. Instead of a growth model, environmentalists argue for human activity based upon principles of sustainable development. Sustainable development advocates that current consumption of natural resources not exceed the ability of future generations to enjoy the same resources¹⁵. The rate of consumption is therefore dependent upon the ability of the eco-system to sustain the level (or "scale") of resource consumption, and the ability of technology to expand the current use of resources without sacrificing future use¹⁶.

The second reason is based upon historical experience. Increases in GNP do not necessarily result in increases in environmental protection. The two studies most often referred to in defense of this belief at best show a relationship between GNP and the level of environmental protection, but a causal relationship remains unproved¹⁷. While economic resources may be one

variable in the equation, another variable; the existence of a democratic government, has also been hypothesized¹⁸.

2) Market Forces versus Environmental Regulation

The second major difference lies in the role of markets. Models based upon economic growth rely on markets to make and sell products, and to set prices which reflect the "true value" of the good. While economists acknowledge that the price setting feature of the market is imperfect, attempts by governments to regulate market behavior have proved equally unsuccessful¹⁹. The preferred role for governments is not to adjust for "market-failure" but to establish and enforce more extensive property rights. Enforceable property rights improves the chances that all costs will be "internalized" in the purchase prices, and therefore more accurately approach the "full-cost" of producing and consuming a good.

Economists argue two points when applying this theory to environmental protection. First, government subsidy programs designed to protect the environment do more harm than good because they distort the market price. They point to the destruction of national forests in the northwest U.S. caused by government subsidies which lower the price of raw logs as evidence of failed government policies. When environmental protection is left in the hands of government officials, the results is not greater protection, but "Populist sentiment and pork-barrel politics, rather than actual environmental dangers, currently determine priorities"²⁰. Second, more extensive property rights would protect the environment by giving individuals greater personal stake to preserve the natural resources for future consumption. A wise investor will value his/her property and protect it for future profits rather than see it degraded beyond some point of marketability.

Most environmentalists approach the role of the market from a different perspective. Markets might be effective instruments for "clearing markets" but it is a poor tool to make broader social and environmental choices. Markets allocate resources based upon information supplied by prices and consumers. However, because prices cannot capture the social and environmental costs, markets do not address questions surrounding just distribution and the scale of human activity²¹.

Traditionally environmentalists advocate government regulation to protect the environment. Governmental regulations might indeed be flawed in application but that is no reason to eliminate them until a better method for environmental protection is discovered. Environmentalists argue that governments should use regulations (and subsidies, where necessary) to protect the environment from the failure of markets to assign prices on the environment, prices that can never be accurately determined. As an example, will an investor in national park land value the future beauty of the park enough to protect it from short term profits that could be gained from harvesting its natural resources? Environmentalists are not willing to leave the answer to that question in the hands of self-interested human beings.

In addition, environmentalists also argue that regulations are legitimate expressions of social values, and as such, are important considerations in the formation of policy²². As reflections of social values they do not merit economic scrutiny, and should not be challenged by the narrow interests of the market.

3) The Efficiency Principle

The pursuit of efficiency has become the goal of almost all people in modern societies. We strive to use our time, our money, and our natural resources in the most "efficient" manner possible. Public perception of the term efficiency suggests that it has a singular meaning. This, however, is not the case.

For the economist, the efficiency principles begins with the assumption that "more is better"²³ "more" results from the more "efficient" use of resources. If resources (both natural and human) are used more efficiently, their use can be extended, either horizontally (in terms of more uses) or in terms longevity.

Trade advocates argue that trade agreements promote greater efficiencies in resource use. Markets produce competitive forces that produce lower prices caused by better (more efficient) use of resources. Environmentally speaking, better efficiency means less damage to the environment, as resources are not wasted, or that new markets for what is now considered environmental pollution are created.

Conventional environmental thinking rejects the market notion of efficiency on the grounds that it only captures those variables most easily quantified economically. Economic efficiency has nothing to do with environmental protection, because it is not concerned with a reduction in resource throughput, only a reduction in the cost of consumption goods. Trade that was environmentally consistent would focus not only efficiency based upon a reduction of cost but a reduction in throughput.

These three differences; growth versus development, the role of markets, and the efficiency principle; do not completely capture all of the differences in opinion between trade and environmental advocates. They do, however, highlight the differences, and provide a framework in which the discussions surrounding UR-GATT, NAFTA, and the OECD policy recommendations can take place.

THE ARENAS FOR TRADE AND THE ENVIRONMENT: GATT, NAFTA, AND OECD

Three policy arenas have focused their attention on resolving this debate: UR-GATT, NAFTA, and the OECD. The results of this interaction are not yet decided; however, it is apparent that the interests of trade have the upper hand in the debate.

The Uruguay Round of the General Agreements on Tariffs and Trade

In 1986 trade leaders from around the world met in Punta del Este, Uruguay, to establish the mandate for the negotiations of a new "Round" of trade talks. The Uruguay Round (UR-GATT) mandate includes:

- *expand GATT trade principles to include agricultural products, tropical and natural resource products, and services.
- *Remove barriers for foreign investment
- *Harmonize laws which effect business transactions
- *strengthen GATT enforcement procedures
- *elimination of the exemption for developing countries

During the negotiations the mandate was expanded to include intellectual property rights.

In an attempt to push the principal negotiating countries toward a decision on UR-GATT, Arthur Dunkel completed the unresolved chapters and published the "Dunkel Draft" in December, 1991. The Draft met with strong opposition from the national and international environmental communities for it's insensitivity toward environmental issues²⁴.

Despite repeated attempts by U.S. and European environmentalists to expand the mandate of the UR-GATT to include the environment, there has been no success. As late as January, 1993 U.S. environmentalists met with U.S. chief negotiator Warren Lavorel. He summarized efforts to "clarify" portions of the Sanitary and Phytosanitary and Technical Barriers to Trade Chapters as complete failures, due in part to the unwillingness of other countries to consider these changes²⁵. Regarding the UR-GATT, the environmental community is united: unless substantial recognition of environmental concerns occur, the UR-GATT is "dead on arrival" in the United States Congress.

The North American Free Trade Agreement

NAFTA negotiations began in May, 1991, following Congressional authorization of "Fast Track" privileges to President Bush to negotiate with Canada and Mexico. To win support for Fast Track President Bush promised not to harm existing environmental health, and safety laws in the terms of the agreement, and to include five environmental advisors to his team of private advisors²⁶. However, President Bush indicated that environmental concerns would be addressed in a "parallel track" to NAFTA, and not be directly addressed within the negotiations themselves. Congress repeatedly reminded the President of the importance of environmental concerns within NAFTA, principally through a bill passed with the Fast Track authorization and the Waxman-Gephardt Resolution²⁷.

For its failure to meet the conditions of the National Environmental Policy Act regarding the formation of trade policy, Friends of the Earth, Public Citizen, and the Sierra Club filed suit against the United States Trade Office²⁸. The decision in the case is currently on appeal with the United States District Court in the District of Columbia Court.

In August, 1992, President Bush announced the end of NAFTA negotiations. In the White House Press Release President Bush indicated his belief that he had met the concerns of the environmental community, producing the "greenest trade agreement ever"²⁹. When the NAFTA Text was released in September, only the National Wildlife Federation formally endorsed its "green provisions"; Public Citizen, Friends of the Earth, Greenpeace and the Sierra Club are formally opposed to the terms in the Text, and are calling for stronger environmental provisions to be included prior to sending NAFTA to Congress for a vote negotiations were completed.

In September, 1992, President Bush announced his intention to negotiate a supplemental agreement on the environment; the North American Commission on the Environment. NACE was originally designed to act as a forum for North American discussion of common environmental concern, but have no direct impact on trade between the NAFTA parties³⁰.

President Clinton has repeatedly expressed his support for the completion of NAFTA, provided adequate environmental, labor, and surge-protection safeguards are negotiated³¹. A February 17, 1993 meeting with United States Trade Ambassador Mickey Kantor left environmentalists with the impression that President Clinton looks to the environmental supplemental agreements as a means of addressing outstanding issues regarding enforcement, funding, public participation, and the use of trade measures to pursue environmental goals³². This meeting, along with Mr. Clinton's commitment to environmental protection within NAFTA, makes us hopeful that the entire "NAFTA package" will adequately protect the environment from the negative effects of expanded trade.

OECD

In 1989 the OECD began discussions linking both trade and the environment together. Following two years of general discussions, the Environment Committee called upon the Secretariat to report on how the individuals goals of promoting trade and protecting the environment may be jointly pursued by June, 1991³³.

The OECD engaged the debate surrounding trade and the environment in the fall of 1991. OECD Working Groups on Trade and on the Environment deliberated on a wide variety of issues relating to trade and the environment, using issue papers written by trade and environment experts. Of concern to the environmental community was the kind of information presented at these expert meetings, and the lack of balanced access to negotiators. Expert documents are restricted, and interested parties have no access to the kind of reports which shape OECD policy. In addition to uncertainties over the kind of information reviewed the OECD Ministers, industry representatives have a formal avenue for input into the process. The Business and Industry Advisory Committee (BIAC) to the OECD regularly supplies them with position papers and information regarding industry perspective on potential policy recommendation³⁴.

In an effort to provide greater balance in the process, the United States government decided to include non-governmental organizations (NGO's) as part of their delegation to the OECD³⁵. Representatives from the business and environmental community have been included as formal members of U.S. delegations to these sessions since November, 1991. To date, no other Member Nation has changed its policy toward NGO inclusion. However, NGO's could not present information on their views directly to OECD Ministers. To facilitate

environmental input, an informal meeting was called by the OECD in September, 1992 to allow NGO's to speak directly to the OECD. Environmental organizations from each country were given two days to present their views directly to full OECD Committee.

Following these meetings, OECD Members continued to debate the issue using internal papers designed to act as a guide for future policy recommendations. Based upon the observations of our NGO representatives and briefing reports from representatives of the USTR, emphasis is directed at eliminating the constraints that national environmental laws place on trade, reliance upon international environmental agreements as the only legitimate constraint to trade, and continued exclusion of environmental NGO representation at the OECD³⁶.

Analysis of the Debate

1) Focus on Trade First. Environment Second Threatens Many Environmental Laws

Despite the history of environmental laws and the importance of seeking a balance between the two issues, it is clear that the interests of trade take precedence over the environment. This unfortunate fact is evident in a number of places, from the OECD assertion that economic growth and sustainable development are compatible, to the GATT's assertion that growth provides the revenues to clean up the environment, to the Business Roundtables recent publication of their opinion of the debate³⁷. When governments, international institutions, and multi-national business leaders find themselves in agreement, the odds against finding a balance between trade and the environment are quite high.

The impact of UR-GATT's mandate on environmental is quite extensive. GATT wishes to eliminate the role that unilateral action plays in protecting the global commons and reduce the ability for national governments to use domestic environmental laws which have global trade implications. They achieve this by creating tests to challenge environmental laws which are insurmountable: domestic environmental regulations must be consistent with accepted international standards, must be based upon incontrovertible scientific evidence, must "balance risk" between environmental objectives, and must prove themselves to the "least trade restrictive" means of achieving the environmental goal. This test for an "acceptable" environmental regulation will have a tremendous impact on existing U.S. environmental regulations, for it will impact efforts to improve air quality, protect natural resources, and preserve ecological sensitivity.

The direction of the OECD's policy recommendations will further institutionalize the predominance of trade over the environment. Of course it is unrealistic to expect an multi-lateral institution with a philosophy dedicated to promote greater economic growth to decide otherwise. And so long as the mandate of the OECD remains to promote greater trade between nations and it protects itself from input from environmental NGO's throughout the world the OECD will never be able to provide balanced policy recommendations on trade and the environment.

Headway has been made in the NAFTA negotiations. Errors in GATT, such as the "guilty before proven innocent" rule, been reversed. NAFTA tries to protect the right of states and nations to set standards to protect the health and safety of its citizens through environmental protection, but its effort is lost in confusing and conflicting language. However, the lack of democratic

accountability, the omission of effective enforcement of environmental laws, addressing the problems of inadequate environmental infrastructure, and the guarantee of public access to the administrative and decision-making processes in NAFTA leave this Agreement an insufficient step towards balance.

NEPA

A perfect example of the imbalance between trade and environmental goals in NAFTA can be found in the NEPA case against the USTR. NEPA was intended to provide policy direction for the U.S. government in its world-wide activity. Section 102(F) specifically speaks of the "worldwide and long-range character of environmental problems." It directs the U.S. government to "maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." President Carter issued an executive order making it clear that IES's are to be prepared on federal activities overseas as well as at home.

Thus in the pursuit of trade policies NEPA requires the U.S. Trade Office to seek agreements which, to the fullest extent possible, maintain a healthful environment worldwide, avoid risk to health of people, and prevent environmental degradation. The Trade Office would not be in compliance with NEPA's mandate if it seeks agreements which trigger processes which degrade environments at home or abroad or increase risks to health here or abroad. Since it has in fact pursued an agreement which will have those effects, it thus has been acting in violation of NEPA.

Unfortunately, the U.S. government does not agree with this argument. It has resisted any requests to comply with NEPA. Instead the USTR offered an assessment of concerns raised by the environmental community³⁸. Their analysis concludes that NAFTA will improve the quality of the environment on

the US/Mexico border because it will help disperse environmental degradation throughout Mexico, and not concentrate it on the border between our two countries.

A final decision by the United States District Court for the District of Columbia is still pending. We anticipate a favorable decision from the court.

A BALANCE BETWEEN TRADE AND THE ENVIRONMENT

Despite the misconceptions played out by the media regarding the desire of the environmental community to "kill" trade policy, environmentalists have spend time and energy in the pursuit of a balance between trade rules and environmental principles. We have offered numerous recommendations, including the most recent one submitted to Ambassador Kantor signed by more than 24 environmental organizations.

What environmentalists seek is not predominance in the relationship between trade and the environment, but balance. Our recommendations focus on guaranteeing a democratically accountable trade mechanism, a balance between the right to act unilaterally to protect the environment and the need to seek common measures, the right to use trade sanctions in pursuit of environmental goals, and a guarantee that economic resources generated by liberalized trade are targeted at the environmental programs required to mitigate the negative effects of trade.

At the very least negotiators should stop trying to control what goes into environmental regulations and conventions as long as those efforts are bona fide, they do not discriminate in favor of domestic products, and do in fact provide for greater levels of environmental protection.

As trade negotiations continue we urge a number of practical changes to the process:

- * The President should issue an executive order directing the Trade Office to fully comply with NEPA, both substantively and procedurally. If the President is unwilling, the Congress must compel the Trade Office through changes in NEPA.
- * The Trade Office should increase its environmental capability by increasing its staff who possess environmental expertise. For trade to be sensitive to environmental concerns, negotiators must be trade and environmental experts.
- * The EPA should be given a greater role in the development of trade policy. It should be given the lead role in the federal government in developing proposals on trade policy affecting the environment. In turn its efforts should be complemented by the expertise found at NOAA and the Department of the Interior. To do this the EPA must "institutionalize" its role in trade policy formation, both within the agency itself, and within the framework of trade negotiations within the USTR.
- * Relevant committees of the Congress should periodically review the way in which these arrangements are working. It should secure testimony of participants in past operations to see whether the EPA is playing the role it needs, and whether the Trade Office is responsive to environmental concerns.
- * The private advisory process available to the USTR also needs revision. In addition to placing more environmental advisors on various technical committees, the Office should also have a committee composed solely of environmental advisors. These advisors should have equal access to the Trade Representative, and be able to read and comment on negotiations in progress.
- * The Trade Office should have a process for consulting more widely with the interested public. As our awareness of the full implications of trade become more known, these impacts should be discussed with the community at large before they are written into laws. Indeed this may slow down the progress of trade treaty negotiations. However, to avoid exacerbating the negative impacts of expanded trade on the lives of citizens and their environments, this step is essential.

ENDNOTES

1. Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361-1407 (1988).
2. Panel Report on "United States - Restrictions on Imports of Tuna, issued 3 September, 1991, DS21.
3. Other GATT decisions which result in negative impact on environmental protection include:
 - Panel Report on "Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted 7 November, 1990. BISD/37S/200.
 - Panel Report "United States - Measures Affecting Alcoholic and malt Beverages", 7 February, 1992.
4. The European regularly publishes a list of U.S. laws which it considers unfairly prohibits access to domestic markets. Report on United States Trade and Investment Barriers, Services of the Commission of the European Communities. The laws identified in this Report should be considered vulnerable to GATT disputes in the event of the passage of the UR-GATT.
5. Jeffrey J. Schott, ed. Completing the Uruguay Round, Washington, D.C.: Institute for International Economics, 1990.
6. The GATT test for legitimate environmental constraints to trade include:
 - Restriction based upon international standards
 - Restriction based upon sound scientific evidence
 - Restrictions must balance risk between products
 - Restrictions must be the least trade restrictive means of achieving environmental objectives
 see December, 1991 "Dunkel Draft" of the Uruguay Round on the General Agreements on Tariffs and Trade, Geneva: GATT Secretariat.
7. op cit at 3.
8. See Lynton Keith Caldwell, International environmental Policy, Durham, NC: Duke University Press, 1990, chapter 2. See also the list of international environmental agreements identified in the GATT report Trade and the Environment. 18, September, 1991.
9. The World Commission on Environment and Development, Our Common Future, Oxford University Press, 1987.
10. In an internal OECD document the Montreal Protocol "process" is compared to GATT's ideal for trade-consistent environmental conventions. GATT accepts Montreal as a model for legitimate environmental constraints to trade, but it

critical of the process for not including GATT officials earlier in the process. GATT has also reviewed the Basel Convention and CITES.

11. op cit at 8.

12. Lawrence, Robert and Charles Schultz, American Trade Strategy for the 1990's, Brookings Institute, 1990.

13. GATT Secretariat, Trade and the Environment, General Agreements on Tariffs and Trade, Geneva, Switzerland. page 2.

14. Daly, Herman, 1991. "Elements of Environmental Macro-Economics" in Robert Costanza, ed. Ecological Economics, New York: Columbia University Press.

15. op cit at 9.

16. op cit at 14.

17. Gene Grossman and Alan Krueger, "Environmental Impacts of a North American Free Trade Agreement," Princeton University Working Paper, 1992. and Robert E.B. Lucas, David Wheeler and Hermamala Hettige, "Economic Development, Environmental Regulation and the International Migration of Toxic Industrial Pollution: 1960-1988" in Patrick Low, editor, International trade and the Environment, World Bank Discussion Papers 159, 1992. Both studies rely on "dummy variables" to explain a good portion of the relationship between greater levels of income and improvements in environmental quality or protection.

18. In papers by Thea Lee, "NAFTA and the Environment: A Critique of Grossman and Krueger", October, 1992 Economic Policy Institute, and Ramon Lopez "Discussant's Comments" following the Lucas et al. piece in World Bank Discussion Papers 159, the authors explore the problem of weak correlation between increases in income and improvements in environmental quality. Both authors postulate that the "dummy" variable necessary to insure that increases in income actually result in greater levels of environmental protection is democratic governance. No study (to my knowledge) exists to support or refute this claim; however, the intuitive appeal of the argument is quite attractive.

19. Anderson, Terry and Donald Leal, 1991. Free Market Environmentalism, Boulder: Westview Press.

20. Stroup, Richard and Jane Shaw, 1989. "The Free Market and the Environment", The Public Interest, Number 97, Fall. pages 30-43.

21. op cit at 14.

22. Sagoff, Mark, 1988. The Economy of the Earth. New York: Oxford University Press.

23. Okun, Arthur, 1975. Equality and Efficiency: The Big Trade-Off. Washington: The Brookings Institute.

24. Letter from Michael McCloskey, Chairman of the Sierra Club, to Member of Congress. February 27, 1991. The letter was endorsed by 12 environmental organizations.

25. Meeting with Ambassador Warren Lavorel, United States Trade Office, February 11, 1993.

26. Letter from Ambassador Carla Hills to J. Michael McCloskey, October 10, 1991. Ambassador identified the five environmental advisors appointed to the Private Advisory Committee. They include:

- Peter Berle, President, National Audubon Society to the Agriculture Policy Advisory Committee
- Jay Hair, President, National Wildlife Federation to the Investment Policy Advisory Committee
- John Sawhill, President and CEO, the Nature Conservancy to the Industry Policy Advisory Committee,
- John Adams, Executive Director, Natural Resources Defense Council to the Services Policy Advisory Committee
- James Strock, Secretary for Environmental Protection, State of California to the Intergovernmental Policy Advisory Committee

A sixth advisor; Russell Train, President of World Wildlife Fund, was selected to serve on the Advisory Committee on Trade Policy and Negotiations.

27. H. Res. 146 adopted by the House of Representatives on May 23, 1991 by a 329-85 vote.

H. Con. Res. 246 adopted by the House of Representatives on July 7, 1992 by a 327-0.

28. Public Citizen et al versus the Office of the United States Trade Representative, Civil Action No. 92-2102-CRR in the United States District Court for the District of Columbia.

29. U.S. Trade Representative, Report of the Administration on the North American Free Trade Agreement and Action Taken in Fulfillment of the May 1, 1991 Commitments, (Washington, D.C.: GPO, 18 September, 1992).

30. Meeting of the environmental community with staff of the United States Department of State, October, 14, 1992.

31. Speech given by Candidate Bill Clinton at North Carolina State University, October 4, 1992.

32. Letter from the Sierra Club to Ambassador Mickey Kantor, March 9, 1993.

33. Organization for Economic Development and Cooperation, 1991. Environmental Policy: How to Apply Economic Instruments. Paris, France.

34. Business and Industry Advisory Committee, "BIAC Statement on International Trade and the Environment", prepared for the November, 1992 OECD Expert Meeting held by the Policy Committees on Trade and the Environment.
35. Meeting with Dan Esty, Environmental Protection Agency, September 11, 1991.
36. Audley, John, unpublished, Fabricating Common Ground: The OECD Approach to Trade and the Environment, Sierra Club internal paper, December, 1992.
37. The Business Roundtable, 1993. "Protecting the Global Environment and Promoting International Trade" Principles and Action Plan".
38. United States Trade Office, "Review of U.S.-Mexico Environmental Issues", February, 1992.

Testimony of Robert Housman and Paul Orbuch of
the Center for International Environmental Law
Before the Environment and Natural Resources Subcommittee
of the House Merchant Marine & Fisheries Committee
on the Impacts of Trade Agreements on Environmental Protection
and Natural Resources Conservation

United States House of Representatives

March 10, 1993

Good morning, Mr. Chairman. Thank you for the invitation to appear before you today.

I am Robert Housman, Attorney with the Center for International Environmental Law (CIEL), and an Adjunct Professor of Law at the American University's Washington College of Law. In my role as Attorney for CIEL, I have provided advice and counsel on trade and environment issues to the Organization for Economic Cooperation and Development, the Environmental Protection Agency (EPA) National Advisory Council on Environmental Policy and Technology, and to a broad range of non-governmental organizations. I also serve as a member of the Council on Foreign Relations Study Group on Trade and Environment. Prior to joining CIEL I was an associate at the law firm of Skadden, Arps, Slate, Meagher & Flom.

Paul Orbuch, who prepared this testimony with me, is also an Attorney with CIEL and an Adjunct Professor of Law at the American University's Washington College of Law. Prior to recently joining CIEL, Mr. Orbuch was an associate with the law firm Howrey & Simon, and specialized in international trade law. While at Howrey & Simon, he also served as a staff member on the Industry Policy Advisory Committee for Trade and Policy Matters.

CIEL has been involved in the public policy debate over trade and environment for more than two years.¹ The following testimony is presented on behalf of CIEL and reflects

¹See e.g. Robert F. Housman & Durwood Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 E.L.R. 10268 (1992); Robert F. Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992); Robert F. Housman, *A Kantian Approach to Trade and the Environment*, 49 WASH. & LEE L. REV. 1373 (1992); Durwood Zaelke, Robert Housman & Gary Stanley, *Frictions Between International Trade Agreements and Environmental Protections*, in United States Environmental Protection Agency, *The Greening of World Trade* 44 (1993); Durwood Zaelke, Paul Orbuch and Robert Housman, eds., *The Trade and Environment Reader* (Island Press, 1993).

In addition to CIEL's more general work on trade and environment, we have also been specifically involved in the NAFTA trade and environment dialogue. See e.g. Robert Housman & Paul Orbuch, *Integrating Labor and Environmental Concerns Into the North*

solely the understanding and opinions of CIEL. This testimony does not reflect the views of the other organizations with which we are affiliated or with which we often work. Further, this testimony should not, in anyway, be construed as a personal criticism of any of the individuals involved in the U.S. government trade and environment policy making process. These individuals strive diligently and with little recognition to develop trade and environment policies that they believe reflect the best interests of this country. However, their work has been hindered by a trade and environment policy making process that is fundamentally flawed and must be corrected.

Finally, it must be noted that this testimony reflects the current status of trade and environment policy making to date. With the change of Administrations less than two months past, our experiences with the new Clinton Administration are too limited to form the basis of an informed judgement on the new Administration's policies and procedures. This testimony does, however, suggest methods for improving trade and environment policy making generally.

While the interplay of trade and environment is a complex one, this interplay can be readily distilled to its essential elements. Unless properly disciplined, economic development driven by enhanced international trade can be unsustainable in nature and can jeopardize the individual and collective environmental security of nations. Concomitantly, legitimate international and national environmental laws, rules and regulations can, in many instances, inhibit or restrict the movement of goods and services among and between countries. Similarly, environmental laws, just like all other forms of regulation, have the potential to be perverted by special interests for protectionist purposes.

Frictions between trade and environmental policies are compounded by what has been described by many as a "clash of cultures."² Trade policy making is generally conducted through closed door negotiations. Parties traditionally effected by trade policies, principally industry, have been relatively content to allow government officials to act in their best interests with minimal oversight.

American Free Trade Agreement: A Look Back and a Look Ahead, -- AM. UNIV. J. INT'L L. POL'Y -- (1993); Robert Housman, Paul Orbuch & Bill Snape, *The Use of Trade Sanctions To Ensure Environmental Compliance Under the North American Free Trade Agreement*, -- GEO. INT'L ENVTL. L. REV. -- (1993). Additionally, CIEL has been actively involved in counseling and consensus-building within the environmental community on its response to NAFTA negotiations, NAFTA text, and proposed supplemental agreements.

²See e.g. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 WASH. & LEE L. REV. 1221, 1228 (1992); Robert W. Jerome, *Traders and Environmentalists*, J. COM., Dec. 27, 1991, 4A.

Environmental policy making, however, presents a striking contrast. Experience reflects that increases in environmental protection are dependent upon the ability of citizens to have access to and participate in government policy making. The interdependency between environmental protection and democratic governance can be shown by contrasting the history of environmental protection in the United States with the record of environmental despoliation in the former socialist countries of Central and Eastern Europe.³

Frictions between trade and environment threaten to undermine the ability of both environmental and trade policies to increase global and domestic human and environmental welfare. For example, trade challenges, such as Canada's recent challenge to Puerto Rico's milk safety standards,⁴ not only place environmental protections at risk, but call into question the legitimacy of the international trading system. Similarly, if environmental laws are allowed to become havens for disguised protectionism, the legitimacy of environmental law will be diminished. Finally, simple economics dictates that if the environmental costs from expanded international trade exceed the economic benefits gained from such trade, we all lose—economically and environmentally.

Thus, resolving existing and potential future frictions between these two essential public policy spheres is critical to the interests of the United States and the international community of nations. Efforts to resolve these frictions are underway both domestically and internationally.

Internationally, in 1991, the parties to the General Agreement on Tariffs and Trade (GATT) convened for the first time a working group on trade and the environment established by GATT in 1971. This working group has a three prong mandate, namely examining: 1) trade provisions in existing international environmental agreements; 2) multilateral transparency of national environmental laws and regulations likely to have trade effects; and, 3) trade effects of eco-labelling and packaging laws. Similarly, efforts are underway in the Organization for Economic Cooperation and Development (the OECD) to develop guidelines for trade and environment policies. Regional trade and environment efforts will also commence shortly in the negotiation of a supplemental environmental

³For an excellent discussion of the relationship between the anti-democratic societies of the former socialist countries of Central and Eastern Europe and their current environmental situations see Margaret Bowman & David Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 921 (1992); see also Chris A Wold & Durwood Zaelke, *Promoting Sustainable Development in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Development*, 7 AM. UNIV. J. INT'L L. & POL'Y 559, 561-565 (1992).

⁴See Brief of the United States Government, Before the Panel Convened Pursuant to Chapter 18 of the United States-Canada Free-Trade Agreement, In the Matter of: Ultra-High Temperature Milk From Quebec, Sect. File No. USA-92-1807-02.

agreement to the North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico.

Domestically, the National Economic Council, supported by an inter-agency process bringing together both trade and environmental agencies, is currently attempting to develop the United States position with regard to the supplemental NAFTA environmental agreement. The United States inter-agency process is also continuing its two-year effort to develop a United States policy with regard to the ongoing GATT and OECD trade and environment negotiations.

The remainder of this testimony will focus on various facets of the United States trade and environment policy making process, pointing out striking deficiencies in the process that undermine United States environmental and economic interests, and providing suggestions for addressing these flaws.

The OECD Trade and Environment Process and the United States Role Therein

As international concerns first arose over frictions between trade and environmental policies, and in an effort to find a forum that would provide a balance between trade and environmental interests, the United States government made a concerted effort to focus international trade and environment discussions within the OECD.

Since 1989, efforts have been underway at the OECD to examine the linkages between trade and environmental policies.⁵ In 1991, the OECD formed a Working Group on Trade and Environment to develop guidelines or principles for trade and environment policies. Since that time the Working Group has labored to develop a consensus approach to reconciling trade and environment.

Unfortunately, apart from its early success in focusing the trade and environment dialogue within the OECD, the United States has been unable to effectively participate in the OECD discussions because of the failure of the U.S. inter-agency trade policy making process to develop a United States' position to advance in these discussions. Despite the fact that these discussions are now entering their second year, and at considerable expense to U.S. taxpayers, the U.S. delegations to these Paris meetings are now struggling to merely set place markers for some latter-day U.S. policy. As these discussions are now moving towards closure, preserving the ability of the United States to set trade and environment policies that are in its interests is growing more difficult.

⁵See OECD Trade and Environment Committees, Trade and Environment, C/MIN(91)10, May 13, 1991, 2.

There is now the distinct likelihood that the inability of the U.S. inter-agency trade and environment policy making process to develop a coherent policy to advance will result in OECD guidelines that seriously limit U. S. trade and environmental policies. For example, through, at least in part, the failure of U.S. international trade diplomacy, a number of OECD member countries are strenuously advocating the OECD adopt a principle against the unilateral use of trade measures for environmental goals. If such a principle results from the OECD process it will endanger not only U.S. environmental and conservation laws, such as the Pelly Amendment⁶ and the Marine Mammal Protection Act,⁷ but could also, ultimately, spill over and further jeopardize other unilateral U.S. trade practices outside the environmental realm, such as section 301.⁸

OECD principles that run contrary to U.S. trade and environmental policies would have at least two significant negative consequences. First, such OECD policies would undermine the United States' ability to advance environmental protections domestically, and to encourage the raising of environmental standards internationally. Second, adverse OECD principles would also seriously undermine United States' competitiveness. For example, as the European Community moves as a block to adopt harmonized standards, such as those applying to automobile emissions, adverse OECD principles could serve to block the United States from advancing its stricter approaches to environmental regulation and environmental standards. U.S. industries that meet the highest levels of environmental protection would be placed at a serious competitive disadvantage *vis-a-vis* European competitors operating under the common market's approach as legitimized and protected by the OECD principles.

There is another risk as well. Almost certainly, the U.S. is missing a critical opportunity to advance its own global and domestic interests.

Serious concerns have also been raised with regard to public participation in the OECD trade and environment processes. Despite the hard fought efforts of the environmental community, public participation in the OECD process—a process setting principles that will apply to U.S. trade and environmental policies—remains severely constrained. For example, OECD meetings are closed to the general public and the documents upon which the OECD discussions are based are also restricted from public purview.

While the United States has made efforts to secure the participation of non-governmental representatives on its delegations to the OECD, the process by which these representatives have participated is also overly and unnecessarily restrictive. U.S. non-governmental (NGO) representatives to the OECD trade and environment meetings, from

⁶22 U.S.C. § 1978 (1988).

⁷16 U.S.C. §§ 1361-1407.

⁸19 U.S.C. §§ 2101, 2411 *et seq.*

both the business and environmental communities, have been required to sign legally binding confidentiality agreements that are unique to the OECD process and are used nowhere else in the U.S. government. The scope of these confidentiality agreements preclude the NGO representatives from effectively serving as representatives of the public interest and the environmental community.

Most importantly, although NGO representatives have been allowed to participate on U.S. delegations to the OECD meetings in Paris, they are precluded from participating in the U.S. inter-agency processes leading up to these meetings. Thus, by the time the NGO representatives enter into the U.S. OECD process, the U.S. participation in these meetings is already determined and unchangeable—because any change is at the mercy of the flawed interagency process in Washington; leaving the NGO representatives to sit idly by listening to discussions in Paris meetings when the U.S. position has been pre-determined in earlier closed door meetings in Washington, D.C.

Moreover, even operating under these severe restrictions, and as official members of the U.S. delegation, U.S. NGO representatives are subject to challenge by other delegations and are precluded from observing certain sessions of the trade and environment meetings. These limitations are so severe that former OECD NGO representatives from both the U.S. business and environmental communities have questioned the value of continued NGO participation in the OECD process absent significant changes to the rules of participation. (See Joint Letter from Mssrs. Durwood Zaelke, President, CIEL and Robert Morris, Senior Vice President, United States Counsel for International Business, to Assistant United States Trade Representative Carmen Suro-Bredie, at appendix A to this testimony.)

In order to prevent the development of OECD trade and environment principles that will undermine the environmental and economic interests of the United States, several steps must be taken. First and foremost, as set out below, political guidance and impetus must be provided immediately to the U.S. inter-agency process to bring about an acceptable U.S. trade and environment policy. Once this policy has been developed, the United States should commence senior level diplomatic efforts to encourage other OECD nations to adopt similar policy positions.

Additionally, in the wake of the end of the Cold War and the flowering of democracy, the United States must commence efforts immediately to encourage other OECD countries to begin the process of democratizing the OECD and the other Breton Woods international institutions. The United States has already been successful within the context of the OECD chemicals group at encouraging other countries to provide enhanced opportunities for citizens' participation in the work of the OECD. A similar effort in the larger trade and environment context would prove most valuable here.

The Role of Selected Individual Agencies and the Inter-Agency Process

The failure of the U.S. inter-agency process to develop a position with regard to the OECD trade and environment discussions is indicative of the state of the U.S. inter-agency trade and environment process as a whole, and the general state of U.S. trade policy formulation.⁹

U.S. trade policy is developed through an inter-agency process that brings together agencies responsible for specific policy areas, such as the environment, with the offices and departments responsible for developing and coordinating trade policies.¹⁰ The tasks of coordinating these sometimes disparate departmental policies and of formulating strategic governmental trade policies, falls principally to the Office of the United States Trade Representative (USTR). USTR was originally envisioned as a small, lean office that would utilize the substantive expertise of the various other federal agencies in channeling overarching trade policies. Instead USTR has developed into a modified Commerce Department that has adopted a piece-meal approach to trade policy, focusing on individual widgets, wonks and services, as opposed to the broader strategic interests of the United States, including economic competitiveness, global stability and environmental security.¹¹

The treatment of trade and environment issues within USTR displays the dysfunctional nature of current trade policy making. When USTR first sought to integrate the environment into its policy making process, it established an Assistant United States Trade Representative for the Environment by adding "the Environment" on to the portfolio of the then Assistant United States Trade Representative for Intellectual Property. The logical connection in this marriage of portfolios is tenuous. While the environmental staff

⁹See generally Bruce Stokes, *Organizing to Trade*, 89 FOR. POL'Y 36, 42-44 (1992-1993).

¹⁰The inter-agency process is governed by 19 U.S.C. § 1801 as amended by section 1621 of the Omnibus Trade and Competitiveness Act of 1988. The inter-agency organization includes USTR as chair, the Secretaries of Agriculture, Commerce, Labor, State and Treasury, and permits USTR to invite other agencies, as appropriate, to attend meetings. The organization's functions are: to assist and make recommendations to the President in carrying out his functions under the trade laws and to advise USTR on carrying out its functions; to assist the President and advise USTR on the development and implementation of U.S. international trade policy objectives; and to advise the President and USTR on the relationship between U.S. international trade policy objectives and other major policy areas.

¹¹Accord Robert Reich, *The Work of Nations* 163-164 (1992). Secretary Reich provides a telling example of this type of USTR behavior. In 1989, Ambassador Hills expended significant political capital to encourage the Japanese government to remove trade barriers effecting the sales of Motorola cellular telephones and pagers. This political capital might have been better spent by Malaysia, the country of origin for most of the telephones and pagers in question, than by the United States. *Id.*

at USTR has worked diligently to address both the trade-related intellectual property and environmental issues at hand, both of these portfolios involve vastly different constituencies, are quite active, and require knowledge unique to their issues. In short, either one of these portfolios is properly a full time task. Yet, at present, there are only five full time and one part time staff persons within USTR assigned to coordinate both U.S. trade and intellectual property and trade and environmental policies.

Moreover, the trade and environment interplay is now further fractured within USTR with the delegation of NAFTA's supplemental agreements, including the supplemental environmental agreement, to yet another office within USTR headed up by Deputy USTR Rufus Yerxa. Many believe that NAFTA's environmental provisions will ultimately set the standard for the GATT's treatment of environmental issues. If this proves to be the case, the work of the NAFTA office in USTR will in great measure determine the outcome of the efforts of USTR's separate environmental staff. While we do not in any way question Mr. Yerxa's abilities or qualifications, one must question why USTR's professional environmental staff is not coordinating the office's role in developing the supplemental environmental agreement. Moreover, depending upon the nature of the environmental supplemental agreement that is ultimately negotiated (*i.e.* whether it includes or does not include trade measures), one must also question whether these negotiations are not more appropriately coordinated by EPA.

Further, trade and environment policy making is an especially difficult task for USTR in that it requires USTR essentially to turn its *modus operandi* on its head. As Professor I.M. Destler notes "[w]hether negotiating abroad or facing pressure at home, U.S. officials responsible for economic relations have leaned persistently in the direction of reducing trade barriers and expanding trade."¹² The present threats to U.S. interests in the trade and environment arena arise principally from threats to United States environmental standards and the failure of other countries to maintain adequate environmental protections, and not from environmental trade barriers abroad.¹³ Thus, USTR which is quite adept at eliminating unfair trade practices abroad, is now confronted with preserving domestic environmental protections under the trade norms it has helped established. For example, in negotiating food safety standards to open foreign markets in the Uruguay Round, USTR officials were pressing for language that would have undermined a number of U.S. food safety laws.¹⁴

Similarly, while USTR presently lacks the structure and staff to effectively coordinate trade and environmental policies, the action or substantive agencies involved are also currently incapable of fulfilling this role. For example, EPA lacks cabinet status, and

¹²I.M. Destler, *American Trade Politics* 105 (2d ed. 1992).

¹³This is not to imply that, over time, such environmental trade barriers will not arise.

¹⁴See Bruce Stokes, *supra* n. 6, at 41-42.

although it participates in the inter-agency trade policy process, it is not even an officially designated member of this process. Moreover, although EPA has in the past been highly active in the trade and environment policy making process, trade and environment responsibilities are not institutionalized anywhere within EPA. Thus, despite the fact that countless EPA programs, such as the implementation of the Clean Air Act's mobile sources provisions, impact trade flows and could be impacted by trade rules, EPA has little permanent, official role in international environmental policy making, let alone trade and environment policy making. Additionally, EPA has no staff officially designated to handle trade and environment policy making issues. EPA's staff problems are compounded by the fact that, apart from an insufficient handful of individuals, EPA now lacks the trade expertise necessary to play a major role in trade and environment.

Moreover, just as trade and environment policy making requires USTR to rethink its traditional *modus operandi*, so too does it require EPA, and other environmental agencies, to reconsider their roles as they relate to economic issues. The state of the world economy and the structure of world markets now require environmental agencies to perform two new forms of analyses of their programs: 1) how will a domestic regulatory program effect the competitiveness of U.S. industries *vis-a-vis* foreign competitors; and, 2) how would U.S. industry react if another country adopted a similar standard—because another country most assuredly will. Thus, enhancing environmental protection while integrating economic concerns into environmental programs is as problematic for environmental agencies as the reverse is for economic agencies.

Along with the environmental and trade agencies, the Department of State also faces unique obstacles in trade and environment policy making. The Department of State, which has official responsibility for international environmental matters, has in the past, lacked the hands-on experience of EPA in environmental matters, and of USTR in trade matters. Thus, while the State Department under President Bush was delegated the task of negotiating the parallel NAFTA environmental agreements, the State Department personnel in charge of this negotiation had little experience with the EPA enforcement programs at issue, or with the NAFTA agreement. Under the leadership of the Bush Administration's State Department, the United States would have entered the negotiations for a NAFTA parallel environmental commission with the weakest bargaining position possible. (See Letter from 26 Environmental Groups to Assistant Secretary of State Curtis Bohlen, at appendix B to this testimony.) Had this approach been followed, Congressional passage of NAFTA might have been further called into question.

The limitations inherent in the current agency structures, magnify themselves when these agencies come together in the inter-agency trade and environment policy making process. *Over the past calendar year alone, by conservative estimate, the inter-agency trade and environment process has directly expended more than 2300 hours of government staff time*

*without resulting in a single substantive U.S. policy on trade and environment.*¹⁵ Speaking from past experience, if an attorney in private practice labored for a full year without anything to show for it their tenure might be short lived.

The failure of the inter-agency process to move forward is caused by a number of critical flaws in the process itself. Given the politicized nature trade and environmental policies have taken on, agencies and sub-agencies with little involvement in actual day-to-day trade and environment issues clamor to drive the process. Meanwhile, the underlying structure of trade and environment policy making inevitably works to pit substantive offices and agencies, such as EPA, and the National Oceanographic and Atmospheric Administration, at odds with USTR and each other. "Intra"-agency conflict is demonstrated by the inability of the Food and Drug Administration (FDA), an important voice in protecting U.S. food safety and labelling standards from foreign attack, to be a direct participant in the inter-agency process. The Department of Health and Human Services (HHS) is seated at the table, relegating FDA to participating through HHS. These flaws were compounded during the Bush Administration's tenure by a lack of direction from the political level to guide and move the process.

The current inter-agency debate over the role of public participation in trade decision making is instructive in this regard. Expanded public participation would democratize trade policy making, and, given public support for environmental initiatives, would favor stronger environmental policies and environmentally-based trade policies. Expanding public participation in trade policy making would, however, require changes to current USTR practices, and would also raise issues with regard to the manner in which the State Department conducts certain negotiations. (See Letter from 26 Environmental Groups to Assistant Secretary of State Curtis Bohlen, at appendix B to this testimony.) Thus, USTR, which has little institutional experience with public participation and has struggled somewhat in its early efforts to implement the concept in its own practices, is confronted on the one hand by EPA arguing for open government, and on the other hand by the State Department citing past precedents for keeping the public out of trade and environment policy making. Further, during this entire debate there has been little guidance provided from the cabinet level and above to direct the process and its outcome. Meanwhile, other nations have solidified their positions against democratizing in any manner international trade

¹⁵This estimate is calculated as follows: the inter-agency trade and environment working group meets on the average of four times per month, with at least 15 staff members present for at least two hours, yielding a subtotal of 1440 staff hours. In addition, there have been at least three OECD trade and environment meetings in Paris attended by U.S. delegations of at least 13 staff members, lasting eight hours a day, for three days (including travel time), yielding a subtotal of 936 staff hours. The combined total of staff time expended thus equals in excess of 2376 hours. Note that this total fails to reflect any of the hours of staff time used in preparation for these meetings or in follow-up to these meetings, nor does it reflect the hours of support staff time expended in these efforts.

negotiations, making any U.S. effort in this regard all the more difficult.

If the United States is to play a leadership role in reconciling trade and environmental concerns within the international community, the United States must first put its inter-agency house in order. A similar prescription is also appealing in the broader context of U.S. international leadership in international trade policy generally. The knee jerk response to re-directing and jump starting the inter-agency process is to further streamline the process by reducing the number of participants and the time for decisions. This approach is, however, largely inappropriate here. While there is a need for the United States to develop, in short order, trade and environment policies, these policies must navigate a Sargasso Sea rife with domestic and international complexities; ill conceived, hastily formulated policies will do more harm than good.

Instead, the need here is for the trade and environment policy making process to be opened up to input from all the effected communities and agencies, as well as Congress, with an eye towards achieving common ground and mutually acceptable policies. With the necessary political guidance, a federal advisory committee approach, similar to the negotiated rule-making approach adopted by EPA in developing the regulations under Clean Air Act Amendments, would provide a forum for taking the wide range of existing ideas and developing them into a coherent U.S. policy.

Early on in the trade and environment dialogue, EPA created an advisory committee on trade and environment, under the auspices of the National Advisory Committee on Environmental Policy and Technology, similar in structure to the committee discussed above, to guide EPA's trade and environment work. This committee was instrumental in moving the trade and environment debate. Unfortunately, due to administrative restructuring within EPA, this committee may now be disbanded.

Correcting the inter-agency trade and environment process will also require changes within the agencies and offices involved. USTR is either too large or too small to conduct the task of coordinating trade and environment policies within the federal government. USTR should either be reduced in size, making it truly a coordinating body dependent on the program agencies for support and guidance, or it must be enlarged to allow it to effectively play a strategic trade policy formulation role.

In addition, the relationship between USTR and the program agencies involved in trade and the environment should be altered to provide a better balance between the trade and environmental agencies. To achieve this balance, trade policy matters must be institutionalized and centralized in the program agencies, in particular EPA. The inter-agency process should be expanded to explicitly provide these other agencies a role in the process. Moreover, the agencies and sub-agencies participating in these discussions should be those with a direct stake in their outcome.

The Role of Congress

At least up until now, U.S. trade and environment policy making has also suffered from a lack of Congressional oversight. In response to concerns that Congress was especially susceptible to protectionist interests that were not in the best interests of U.S. trade policy, section 102 of the Trade Act of 1974, as amended by section 1102(b) and (c) of the Omnibus Trade and Competitiveness Act of 1988, provides what are known as "fast track" procedures for Congressional consideration of certain trade agreements.¹⁶ Fast track procedures provide the Executive Branch with the authority to negotiate trade agreements and provide special rules for Congressional consideration of qualifying trade agreements. Namely, fast track procedures limit the time Congress has to consider qualifying trade agreements submitted to it for its approval. Fast track procedures also require Congress to vote either in favor of, or against, a qualifying trade agreement and its implementing legislation, eliminating the ability to amend either the agreement or the implementing legislation.

These procedures have come under intense scrutiny and criticism from members of both the environmental community and government watchdog groups. Opponents of fast track argue that these procedures provide the Executive Branch with "*carte blanche*" for free trade agreements, with minimal oversight from Congress and the American public.

On March 1st, 1993, the statutory authorization for fast track expired. Thus, in order to continue negotiations of the Uruguay Round of the GATT, and to commence negotiations of other bilateral or multilateral trade agreements, President Clinton must seek re-authorization of negotiating authority. The President has reportedly indicated his desire that such negotiating authority again include fast track procedures.

If President Clinton seeks re-authorization of fast track, the role of Congress in U.S. trade policy making will once again be thrust to the forefront. Past experience with the Bush Administration's refusal to provide adequate information to Congress and the public concerning the U.S. role in trade negotiations raises serious concerns with regard to a "clean reauthorization" of fast track. However, many argue that the special nature of trade negotiations requires the President to be accorded greater leeway and authority in conducting these negotiations. Ultimately, the fate of fast track may lie in this Congress' ability to work with the Clinton Administration to craft a modified fast track approach that provides the Executive Branch with adequate environmental benchmarks as part of its negotiating goals along with procedures for Congressional and public oversight and participation in the negotiating process.

¹⁶For a general discussion of fast track see Alan F. Homer & Judith H. Bello, *The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L LAW. 183 (1992).

The Role of the Public

While the fast track procedures have largely sheltered U.S. international trade policy making from the public, the private sector advisory system does provide a limited existing mechanism for public oversight of Executive Branch trade policy making and negotiations. The private sector advisory system was established by Congress in 1974 with the explicit goal of ensuring that U.S. trade policy and negotiations adequately reflected the concerns of the private sector.¹⁷ The advisory committee structure was continued by the Congress in section 1631 of the Omnibus Trade and Competitiveness Act of 1988. The advisory committees are organized and managed by USTR in conjunction with the Secretaries of Commerce, Defense, Labor, Agriculture and Treasury. There are approximately 1,000 advisors serving on almost 40 committees. The committee structure is three-tiered, such that the most senior level consists of the Advisory Committee for Trade Policy and Negotiations (ACTPN). The ACTPN is composed of 45 representatives, appointed by the President, from all sectors of the economy, and its function is to provide overall guidance on trade policy matters, including trade negotiations and agreements.

The second tier in the advisory system is made up of seven policy advisory committees representing overall sectors of the economy (industry, agriculture, labor, defense, services, investment, and intergovernmental). These committees focus on the impact of trade issues on their particular sectors. Finally, sectoral or functional advisory committees have also been established consisting of technical experts from various sub-fields in the industry, agriculture and labor sectors. Each of these committees analyzes an individual sector or commodity group (e.g., steel, dairy, services) to provide specific and technical information on the effect of trade policy options. Members of the second and third tier committees are appointed by USTR in conjunction with the secretary of the relevant department or agency. Membership in the second and third tier committees is loosely governed by the statute in that it specifies certain economic sectors that should be included while providing that "other interests, as appropriate" may also be represented.¹⁸

The advisory committee system provides its private sector members and their staffs with unparalleled and direct access to trade policy makers and negotiators. This access is permitted during the decision-making on trade negotiating objectives and during the negotiations themselves. The importance of the opportunity for the private sector advisors to influence the composition of U.S. trade negotiating objectives should not be underestimated. Once formal trade negotiations actually begin, it becomes extremely difficult to alter the U.S. negotiating course because of the constraints posed by the inter-agency process not to mention the need to develop and implement a negotiating position to present to our trading partners. It is thus critical for any affected interest to have its

¹⁷ 19 U.S.C. §2155.

¹⁸ See 19 U.S.C. §2155 (c)(1).

voice heard *before* trade negotiations begin. The interest otherwise faces an uphill battle to gain trade benefits or to protect its turf as the negotiations commence, positions are solidified and agreement is reached in a flurry of activity and last minute horse trading.

Furthermore, advisory committee members receive regular confidential briefings on the status of trade negotiations, and direct input to the negotiators by the affected sector is facilitated and encouraged. This access and information permits the committee members to marshal the technical resources, as well as the influential contacts necessary to attempt to alter the course of negotiations or protect turf previously secured. In addition, Congress requires the private sector advisors to submit a report to Congress on any trade agreement entered into by the Administration prior to its consideration by Congress. These reports set forth the negotiating objectives prescribed by the committee prior to the commencement of the negotiations and analyze the extent to which the objectives were met based on the trade agreement as finally negotiated. These advisory committee reports also permit the committee to endorse or decline to endorse the final trade agreement as a whole. Individual members of the committees may dissent from the majority view or file separate comments.

Despite this well-regarded public advisory committee process, the advisory process has been unable to keep pace with need for environmental representation given the environments' increased importance with respect to trade policy. That the environment has been elevated to a critical role in trade policy making is evidenced by today's hearing and others held by the Congress, and by the commencement of negotiations of a supplemental environmental agreement in conjunction with NAFTA. The Bush Administration did attempt to placate the environmental movement during the contentious debate over the extension of fast track negotiating authority by inviting one environmental representative to sit on the ACTPN and four other environmental representatives to join the second-tier sectoral policy advisory committees. These five individuals cannot adequately represent the entire environmental community, nor is their voice strong enough to be heard within the advisory committee system of approximately 1,000 advisors and 40 committees. Additionally, four of the representatives chosen by President Bush came from organizations that apparently either supported the President's request for fast-track reauthorization or agreed not to oppose it.¹⁹ Furthermore, the environmental representative to the ACTPN chose not to dissent from or comment separately in the final ACTPN committee report which endorsed NAFTA as negotiated, including its environmental provisions. The present environmental membership in the advisory committee structure is therefore extremely limited in number and also represents but one point of view on environmental effects associated with NAFTA, effects that President Clinton recognized—even during his fall Presidential campaign—require further negotiation.

¹⁹ See Michael Gregory, *Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective*, 7 J. ENV. L. AND LIT. 99, 106 (1992).

Environmental input into the trade policy making apparatus should no longer be treated as any less important than input from industry, agriculture or labor interests. The human impact of the environmental effects of unwise trade policy can be as wide-spread as the job displacement caused by industry adjustment. One need only visit the U.S.-Mexico border for an illustration of this point. Additionally, consumer, health and safety interests can be put directly at risk by trade agreements, as the Canadian trade suit against Puerto Rico's milk safety standards demonstrates. While there are valid arguments that the economic development engendered by enhanced trade, can, in and of itself, lead to increased environmental protection down the road, U.S. trade policy should seek to protect and increase environmental safeguards even prior to the development of this new environmental ethic. The existing private sector advisory system is one method of ensuring that environmental interests are able to directly contribute their expertise and concerns to U.S. trade policy makers. Taking full advantage of this avenue of participation and incorporating environmental concerns can also lead to greater public acceptance of the concept of trade agreements and the concomitant costs and benefits to society.

Fortunately, Congress wisely designed the advisory committee statute with the flexibility required to address the need for full and fair environmental representation in the advisory committee process. Environmental interests qualify as the "other interests, as appropriate" referenced in the statute for representation as a second-tier advisory committee. Such an "Environmental Policy Advisory Committee for Trade Negotiations and Trade Policy" (EPAC) could be technically supported by a third tier sectoral advisory committee as the statute also permits. Despite USTR's professed interest in an EPAC, USTR has failed to create an EPAC for more than two years now.

In order to ensure that the wide range of views in the environmental community are heard, an EPAC should be formed with membership determined in cooperation with the environmental community itself. The selection of members could be accomplished through a nominating process among environmental NGOs. Thereafter, and from the individuals nominated, USTR in conjunction with EPA can select the members of the EPAC for rotating terms. Consumer groups with relevant trade expertise, along with the environmental goods and services sector (e.g., The Environmental Business Council) should also be represented on the EPAC. Environmental membership should continue on the first-tier ACTPN, but this representative should also be chosen through a nominating process undertaken by the environmental community.

The actions needed to create an EPAC can begin immediately. It is recommended therefore, that the Congress urge the Clinton Administration to undertake this important step to begin to integrate environmental interests into U.S. trade policy making through the creation of an EPAC in the private sector advisory system. As will be discussed in the second panel today on NAFTA, environmental issues were not comprehensively addressed in those negotiations. With the immediate creation of an EPAC, environmental interests will not be wholly excluded from participating in the continuing negotiation of the Uruguay Round of the GATT and the probable request for an extension of the President's trade

negotiating authority. Such environmental participation could certainly ease the path for the Clinton Administration as it seeks approval from the Congress for these major trade policy initiatives. The effectiveness of an EPAC, however, will be largely dependent upon the structural changes within USTR discussed above. Simply treating the environment as a sector, pitted against other sectors, will not address the larger question of trade and environment integration. Nonetheless, an EPAC would be an important step in such an integration process.

Public participation in trade and environment policy making will only be of use if the public is aware of the consequences of the decisions to be taken. Under the Bush Administration, the public was routinely denied the information necessary to play an informed role in trade decision making. Most notably, the Bush Administration's repeated refusals to prepare and make available an environmental impact statement concerning both the NAFTA and GATT negotiations precluded the public from understanding the ramifications of these agreements and of the policy options available in crafting them. The fundamental principles underlying the National Environmental Policy Act²⁰ must be fully applied to trade agreements.

Conclusion

The trade and environment policy making process is in need of a substantial overhaul. Absent significant changes to the U.S. trade and environment policy making process, the interaction of trade and environment issues threatens to undermine U.S. economic and environmental interests. Given the pace with which these issues are moving forward, and the relative inexperience of policy makers in this new field, such an overhaul should not be unexpected, nor should it be resisted. We hope the suggestions herein will be useful in undertaking this review. Thank you for the opportunity to appear before you.

²⁰42 U.S.C. §§ 4321-4370a.

Appendix A



United States Council for
International Business

February 11, 1993

Ms. Carmen Suro-Bredie
Assistant United States Trade Representative
Office of U.S. Trade Representative
600-17th Street, NW
Room 409
Washington, DC 20506

Dear Carmen:

Drawing on our experience as members of the U.S. Delegation to the February 1st and 2nd meeting of the Organization for Economic Cooperation and Development (OECD) Joint Experts Group on Trade and the Environment we wish to offer the following joint observations and proposals for the more effective participation by representatives from the business and environmental communities in the United States' inter-agency process concerning the OECD's trade and environment work. We strongly believe that the U.S. government can benefit from the considered and timely input of views from such representatives. The current procedures for facilitating such participation, however, are both inadequate and inefficient.

In order to improve public participation in the U.S. inter-agency trade policy making process, the U.S. government should create a formal advisory committee on trade and environmental policy, comparable to the other policy advisory committees under the ACTPN system. We believe the immediate implementation of such an advisory committee would be highly beneficial to the U.S. government policy making process.

If you wish, however, to maintain the present system of nominating two private sector representatives, the participation of these private sector representatives could be substantially improved by taking the following actions:

- Representatives from both the business and environmental communities should be selected by these communities well in advance of the next meeting of the OECD experts.
- Representatives should receive copies of all documents relevant to the meeting *as soon as they are available to the U.S. government*. We propose that the representatives consult with members of their respective constituencies concerning the issues raised in the documents upon which they are asked to comment, though not of course, about the specific language in the papers and without distributing copies of them.

The objectives of this consultation process would be to provide comments to the U.S. government that are representative of the views of both the environmental and business communities. It is crucial to the U.S. trade policy making process that the government get timely and considered views from representatives of those communities, thus they must receive the documents to be reviewed, well in advance. It must be understood, however, that unless explicitly stated, any comments would be offered in the representatives personal capacities, and not as the official views of their respective constituencies or individual organizations. Representatives should submit any comments they have on the documents to the co-chairs of the U.S. delegation at the earliest opportunity. The co-chairs and the private sector representatives on the delegation should then meet, to discuss the representatives recommendations.

- Representatives of the two communities should be involved from the onset in the process of developing the U.S. positions for the OECD meetings. Providing time for representatives to consult with their constituencies before the U.S. positions have been set will allow our advice and counsel to play a greater role in developing informed and sound U.S. policies regarding the OECD trade and environment process. It is precisely this need for early and ongoing consultations that has led us to recommend a Trade and Environmental Advisory Committee as discussed above.

We believe that it is vital to have private sector representatives present at the OECD meetings. Thus, we strongly support the efforts of USTR, and the other U.S. agencies involved, to ensure our ability to be present at and participate in the OECD process. However, our overall ability to contribute constructive advice to the U.S. government depends on the timely receipt of the relevant documents and on our ability to meet with members of the delegation during the inter-agency process, to discuss our recommendations.

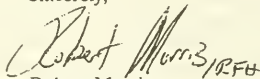
If at any time in the future participation of the private sector representatives on the U.S. delegation is blocked by another OECD member country delegation during a meeting,

the chair of the U.S. delegation should meet with the business and environmental community representatives to formulate the U.S. position to be advanced at the relevant OECD meeting. We strongly recommend that the chair of the U.S. delegation de-brief the business and environmental communities, shortly after the meeting in Paris. This would also be the occasion for the two representatives to be informed of the results, as supplemented by any private de-briefing for them which the chair deems necessary. Again, given the confidentiality restrictions, we cannot report to our constituents any more than what is authorized and is conveyed to them by the government's spokesperson, and of course, we cannot share any restricted documents with our constituents, or our individual organizations.

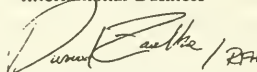
If USTR determines that an ACTPN committee should be formed, we would be more than willing to assist you in this endeavor. If, however, you wish to continue the current process, as modified by our recommendations, we will select representatives from the business and environmental sectors for the next OECD meeting as soon as possible. In the event that you opt to maintain the current process, without modification, and without the opportunity for us to offer our recommendations in a timely fashion, we would want to inform our colleagues and our respective constituents of the views we have expressed in this letter and our views that the present arrangement is counter-productive to our efforts to democratize the decision making process and for conveying useful advice on these issues to either of our communities. To this end, we can only conscientiously consider recommending to our constituencies that our organizations continue to support the costs of our participation in future meetings if we can genuinely be of service to the U.S. delegation.

We look forward to hearing from you at your earliest convenience. (Robert Morris: 202-371-1316; Durwood Zaelke: 202-332-4840)

Sincerely,



Robert Morris,
U.S. Council for
International Business



Durwood Zaelke,
Center for International
Environmental Law

Appendix B



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

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November 18, 1992

The Honorable Curtis Bohlen
 Assistant Secretary for Oceans, International
 Environment & Scientific Affairs
 Department of State
 Washington, D.C. 20520-7818
 Facsimile: (202) 647-0217

Re: Critique of the Proposed North American Commission on the Environment

Dear Mr. Bohlen:

Thank you for taking the time to brief members of the environmental community on the negotiations for the North American Commission on the Environment (the "NACE" or the "Commission"). *The Center for International Environmental Law, Defenders of Wildlife, Sierra Club, Greenpeace, Public Citizen, Friends of the Earth, The Humane Society of the United States, Arizona Toxics Information, Proyecto Fronteriza de Educacion Ambiental, Red Fronteriza del Salud y Ambiente, Border Ecology Project, The Fair Trade Campaign, Enlace Ecologico, The Community Nutrition Institute, Earth Island Institute, Humane Society International, Whale & Dolphin Conservation Society, International Fund for Animal Welfare, International Wildlife Coalition, Earthtrust, Environmental Investigation Agency, Rainforest Action Network, and The Fund for Animals* strongly support, in principle, the creation of a trilateral environmental commission between the United States, Canada, and Mexico. However, taking into account the information you provided us, we are troubled by the current direction of the NACE negotiations.

Our fundamental concern is simple: we believe the NACE will effectively add nothing to the efforts to address environmental concerns raised by the North American Free Trade Agreement (NAFTA) and tri-national trade and investment *unless* the negotiations for its creation are radically altered. The new direction we believe the negotiations should follow is explained in the following comments.

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 Assistant Secretary for Oceans, International
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Powers and Duties

First, we are concerned that the scope of the NACE's powers and duties is too narrow. The fundamental rationale for the NACE is to monitor the environmental effects of NAFTA and to ensure that increased trade under NAFTA does not jeopardize human health and the environment. Yet, as currently envisioned by the negotiators, the NACE's principal task will be to coordinate environmental policies among the three member countries. The Commission has no powers to perform what we understand to be its primary task and principal reason for creation—monitoring NAFTA. The NACE's powers must include, at minimum, the ability to monitor environmental threats and address environmental degradation, particularly when these threats or degradation relate in any way to the NAFTA.

Further, we believe that in order for the NACE to be able to address the serious existing and future environmental hazards, the Commission should have the power to ensure the enforcement of each country's own environmental laws. Empowering the NACE with the authority to halt polluting activities while providing appropriate remedies to those harmed will create both an effective deterrent to a nation foregoing enforcement of its existing environmental laws, and a powerful incentive for each nation to fulfill its own environmental responsibilities. An alternative approach to achieve the same goal would give the NACE the authority to condition the realization of NAFTA-enhanced free trade benefits by each country upon the enforcement of their own environmental laws. While we recognize that there are concerns over the NACE infringing upon the sovereignty of the member countries, NAFTA itself, in such areas as the intellectual property and antitrust sections, infringes upon the sovereignty of the member countries; these trespasses are, however, believed to be minimal and justifiable in light of the economic benefits NAFTA presents. Similarly, environmental concerns should be an integral part of trade decision-making.

Moreover, we are concerned that even the NACE's limited coordination powers, as now being negotiated, are too narrowly defined. As you related the powers now being negotiated, the NACE can only take up matters that are either trilateral in nature or arise under NAFTA. These jurisdictional parameters substantially limit the NACE's ability to coordinate among the three countries with an eye towards avoiding trade and environmental conflicts. Many, if not most, trade and environmental conflicts arise in a bilateral context. Under the Commission's current framework the NACE will have no role in preempting these conflicts. For example, if the United States is required under statute to address a bilateral environmental threat by taking trade measures against the offending nation, this action will not come within the NACE's jurisdiction until the United States applies, or

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perhaps threatens to apply, the trade measures in question.¹ By the time the NACE is empowered to hear the environmental concern, the case will most likely be under consideration by a trade dispute panel under NAFTA article 20. Further, given the limitations of existing bilateral agreements between the United States and Canada, and of the recently signed bilateral agreement between Mexico and the United States, there is no effective bilateral mechanism for avoiding trade and environment conflicts.² The NACE's limited jurisdictional powers as now being negotiated are antithetical to the original goals of the NACE and will unnecessarily handicap the efforts to monitor the wide range of environmental effects caused by NAFTA.

Structure

The structure of the NACE currently being discussed also precludes the NACE from effectively addressing environmental threats and concerns. As now envisioned, except when the environmental officials of the three countries come together to meet, the NACE will exist only on paper. Under this structure the NACE will have no independent ability to gather and develop objective information. The NACE's ability to address an environmental concern will be totally dependent upon the three member countries submitting the necessary information.³ Often, it will be against a country's misperceived short-term interests to gather and provide information about its environmental deficiencies to its trading partners and the international community. Thus, it is likely that the NACE will suffer from an inability to obtain the information necessary to fulfill even its limited functions now being discussed.

¹Similar problems would arise if the trade sanctions imposed were discretionary under United States law.

²See Agreement Between the Government of Mexico and the Government of the United States of America Regarding Strengthening of Bilateral Cooperation Through the Establishment of a Joint Committee for the Protection and Improvement of the Environment.

³It is possible that under the current framework the parties might choose to create a standing committee on a particular environmental issue and staff it from the environmental protection agencies of the three countries. However, the likelihood of such committees being created is substantially diminished by the lack of dedicated funding for such committees. See funding concerns set out below.

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The NACE must have the independent ability to gather and analyze relevant information and to do this the NACE must have some form of permanent staff.

Additionally, we support President-elect Clinton's proposal, announced in his October 4, 1992 speech delivered at Raleigh, North Carolina, to place responsibility for the conduct of this trilateral environmental protection commission at a higher level of government than the ministerial level now proposed. To this end, we firmly support the idea that the responsibility for United States' participation in the commission be vested with the Vice President in the United States, and would support similar efforts to elevate the level of governmental participation in Mexico and Canada.

Funding

Our concerns regarding the NACE's structure, and the need for the creation of a permanent NACE Secretariat, are intimately tied to our concern over the funding arrangements for the NACE. As you related to us, the current negotiations would have each country pay for its own participation in the NACE meetings, and, if additional NACE activities are undertaken, the funding for these activities will be determined when these activities are agreed upon. This funding structure will significantly limit the actions of the NACE. Faced with financial constraints, the member countries will be hard pressed to find monies to pay for their own participation in the NACE, let alone to fund additional NACE actions. The end result is likely to be that the NACE will exist only as a set of meetings, held at best a few times each year, to discuss environmental affairs—nothing more. This is a far cry from the NACE envisioned by the undersigned organizations. In order for the NACE to work, a trilateral fund must be created to provide dedicated monies for NACE activities. Funds may also be raised as part of the fines or damages received in citizen actions (*Qui Tam*) triggered under the NACE or NAFTA and its implementing legislation. The monies for the NACE must be sufficient to fund the permanent NACE Secretariat and to cover the costs of the activities the NACE Secretariat should be empowered to conduct. These monies should also be available to fund, where necessary, the participation of citizens in the NACE's activities.

Public Participation

We are particularly concerned by the lack of public participation in the negotiation of the NACE. We believe that public participation is an essential element to the creation of an effective trilateral environmental commission. We commend you for your efforts, and

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the efforts of USTR and EPA, to encourage public participation in the Border Plan process. The previous efforts undertaken to bring the public into the Border Plan process should serve as a precedent and model for the NACE negotiations.

Additionally, we are concerned that the NACE as now proposed lacks sufficient opportunities for public participation in the Commission's activities. For example, the current NACE framework would require citizens' complaints and concerns to be filtered through their national governments, giving these governments a veto over the issues the NACE will hear. In order for the NACE to serve the needs of citizens in all three nations, citizens must have the right to petition the NACE directly, as well as their own governments, to investigate their grievances. Thereafter, the NACE should investigate such petitions and complaints unless, within a reasonable time period, an adequate national remedy is shown to exist.

Further, the current NACE proposal fails to grant citizens in all three participating countries the right to have access to and participate in all of the NACE's activities. In order for the NACE to be an effective mechanism for sustainable development and environmental protection in the three member countries, the public must have the right of access to and participation in all the Commission's workings. We recognize that, in certain instances, there is a role for secrecy in international relations, however, existing diplomatic channels already provide sufficient opportunities for conducting these sensitive affairs without imposing limits on participation in the NACE as well.⁴

We understand that at least one of the United States' NAFTA and NACE partners, Mexico, shares our belief that public participation is *sine qua non* to an effective trilateral environmental commission. President Salinas is on record as supporting public participation in monitoring environmental laws and participating in environmental decision-making,⁵ and presumably this includes the NACE, as well as NAFTA-related trade and environmental issues. Further, we have reason to believe that during the recent NACE negotiations in Ottawa, Mexico advocated the public's involvement in the NACE negotiations, and in the NACE itself. We also have reason to believe that Mexico proposed during these negotiations the creation of an independent mechanism for the NACE to receive complaints from the public.

⁴The rights of citizens to participate in the NACE's international monitoring and enforcement activities must be separate from, and without prejudice to, any independent rights of judicial or administrative review granted to citizens under other provisions of domestic or international law.

⁵See *A Conversation With Mexico's President*, International Wildlife, Sept./Oct. 1992.

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The briefing on the NACE you provided us left us with the distinct impression that the United States had been a leading advocate of citizen participation in the NACE during the Ottawa negotiations. This impression, however, appears to conflict with the information we have received concerning Mexico's positions during the Ottawa negotiations. In light of these apparent contradictions, could you please set forth for us the United States' negotiating positions on the following: 1) citizens' participation in the *negotiation* of a trilateral environmental commission; 2) direct citizens' participation in the *activities* of the trilateral commission itself; 3) the establishment of an independent mechanism for the trilateral commission to receive citizens' complaints; and 4) any other considered mechanism for citizen or other independent review of environmental performance or compliance of the NACE/NAFTA parties. Perhaps the simplest way to clarify the United States' negotiating positions on these matters would be to provide us with the State Department's negotiating instructions for the Ottawa meeting, and for all future NACE negotiations. We strongly urge the United States to aggressively pursue the negotiation of a NACE which provides the public in all member countries the right to unfettered access to and participation in the Commission's activities.

Pace of Negotiations

Related to our concerns over the lack of public participation in the NACE negotiations, we are also troubled by the rapid pace of the NACE negotiations. We believe that the breakneck pace of these negotiations precludes the public from effectively participating in the creation of the NACE. Lack of public participation in the NACE's creation may undermine public confidence in the institution, ultimately diminishing its effectiveness, and, potentially, threatening public support for NAFTA itself. Moreover, a hastily created NACE will lack the substantive framework necessary for it to play a useful role in trilateral environmental and trade affairs.

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If the NACE is to be an effective international institution dedicated to sustainable development and the protection of human health and the environment among and between the three member countries, the concerns set out above must be reflected in the negotiations of the NACE and the Commission's ultimate framework and scope of powers. A trilateral Commission comprised of nothing more than an intermittent series of ministerial meetings, forced to scramble for a budget, devoid of investigative or enforcement powers, and closed to public participation will do nothing to improve the environment in the member countries. We still do believe the idea of the NACE has merit and we hope that a more realistic and imaginative proposal for a trilateral commission will be presented to Congress as a supplemental part of the overall NAFTA package. We look forward to your response and would welcome the opportunity to discuss our concerns with you more fully. Thank you.

Respectfully submitted,

The Center for International Environmental Law
 Sierra Club
 Greenpeace
 The Fair Trade Campaign
 The Humane Society of the United States
 International Wildlife Coalition
 Proyecto Fronteriza de Educacion Ambiental
 Red Fronteriza del Salud y Ambiente
 The Community Nutrition Institute
 Humane Society International
 Whale & Dolphin Conservation Society
 International Fund for Animal Welfare

Defenders of Wildlife
 Friends of the Earth
 Public Citizen
 Border Ecology Project
 Arizona Toxics Information
 Enlace Ecologico
 Earthtrust
 The Fund for Animals
 Earth Island Institute
 Environmental Investigation Agency
 Rainforest Action Network

cc: Ambassador Hills
 Administrator Reilly
 Senator Bentsen
 Senator Baucus
 Senator Riegle
 Congressman Gephardt
 Congressman Rostenkowski
 Congressman Gibbons
 Congressman Brown
 Congressman Bacchus



Buyers Up • Congress Watch • Critical Mass • Health Research Group • Litigation Group

Ralph Nader, Founder

Testimony of

Ralph Nader

and

Lori Wallach

Director of Trade Program

Public Citizen's Congress Watch

on

Wednesday, March 10, 1993

before the

**House Merchant Marine and Fisheries Committee
Subcommittee on Natural Resources and the Environment**

Introduction

Mr. Chairman, we welcome this opportunity to discuss the important issue of international trade and its impacts on the environment, health and safety.

In the next year, Congress likely will face votes on the North American Free Trade Agreement (NAFTA), the Uruguay Round expansion of the General Agreement on Tariffs and Trade (Uruguay Round) and the reauthorization of a special "fast track" procedure for Congressional consideration of international trade agreements. This Committee is doing a service to both the Congress and the public by making the environmental, health and safety issues of trade a Committee priority, and by holding this hearing.

While admittedly it is difficult to predict the precise effect that the rather technical language of the NAFTA and Uruguay Round will have, few contest that the impacts on U.S. environmental and consumer policy will be great. The NAFTA and Uruguay Round will extend the purview of trade agreement into such intimate issues as food safety, control of natural resources, and consumer product safety. Congressional decisions to approve the NAFTA and the Uruguay Round will have far-reaching future effects on this country's ability to adopt and enforce strong environmental, consumer, and worker safety measures. The Agreements will obligate both the federal and state governments to adhere to a set of principles that limit our ability to determine the nature of our environmental and consumer protections. Other signatories to these Agreements will be given means to require us to accept imports that fall short of our protections, and to challenge our laws before international trade tribunals, which may order us to pay monetary sanctions if we do not weaken our laws.

Despite the extension of trade rules to environmental and consumer protection issues, the NAFTA, the Uruguay Round, and the congressional fast track procedure

provide no changes in the procedures for developing trade policy nor in the operations of the actual trade agreements to accommodate these new policy areas. Thus, the upcoming trade agreements will profoundly impact the manner in which policy on environmental and consumer protection will be developed, and decisions in these areas taken. Years of citizen advocacy has resulted in systems of policy formation and decision-making in the United States that provide opportunity for citizen participation and oversight. The openness provided by the Freedom of Information Act, the Government in the Sunshine Act, the federal Advisory Committee Act, the Administrative Procedure Act and other federal and state procedural safeguards, is sharply contrasted by the secrecy and exclusion that currently permeates trade policy formation and the dispute and standards-setting bodies the NAFTA and Uruguay Round would establish.

In summary, we believe that the international trade arena is an inappropriate forum for decision-making on environmental, health and safety policy. Further, while we believe in the need for international trade rules to rationalize international commerce, we believe it is vital to recognize that trade rules like any system of rules embody certain values and goals. At present, both the procedural and substantive rules that now characterize international trade policy as established in the General Agreement on Tariffs and Trade, and amplified in sub-agreements such as the NAFTA, conflict with the procedural needs and substantive values of environmental and consumer protection. Policy-making on such issues must remain fully within the jurisdiction of more democratic and accountable bodies situated geographically so as to maximize the opportunity for citizen oversight and participation. However, changes to open current trade procedures to the public and to neutralize current trade rules' negative impact on environmental and consumer protection are necessary to improve the unacceptable status quo. Such changes to domestic trade law and to international trade agreements are urgently needed.

Congressional votes to approve such far reaching trade agreements, as the NAFTA and the Uruguay Round, will make numerous specific changes to U.S. law, and bind the U.S. to entire systems of rules and dispute resolution for the future. It is not an

exaggeration to conclude that one vote by the Congress on the NAFTA or Uruguay Round will have as much impact on the lives of Americans as the regular work of several Congressional sessions. Thus, we commend Chairman Studds for his leadership in bringing to the forefront such vitally important trade issues that have to date not received the attention they merit. We look forward to his leadership in ensuring the U.S. trade policy does not undermine hard won citizen victories in environmental and consumer protection and open governmental procedures.

I. The Current Conflict Between Environmental, Health and Safety Policies and Trade Policies.

A. Conflicting Values

The core principle of international trade policy is to remove impediments to the free flow of goods and services between countries. Yet many environmental, health and safety measures do present such impediments. Stopping importation of goods that do not meet U.S. standards, for instance food containing pesticide residues, products that do not meet U.S. safety specifications, products made from endangered species including ivory and whale products, or products containing dangerous chemicals, are fundamental tools in environmental, health and safety policy. Further, Congress has passed laws to accomplish environmental goals by limiting importation of goods on the basis of the process through which they were manufactured or harvested. Thus, current U.S. laws prohibit importation of seafood caught in environmentally detrimental ways, of wild-caught birds and the Clean Air Act will put into place in the future bans on the import of goods manufactured with ozone-depleting chemicals. Laws limiting export of certain goods, such as raw logs from the Pacific Northwest, have also been passed on the federal and state levels.

These measures could run afoul of current trade policy set forth in the GATT and renumeralated in the NAFTA and in the 1991 Draft Final Act Text of the Uruguay Round negotiation on GATT. First, the NAFTA and the Uruguay Round provide dispute resolution mechanisms to judge the validity of environmental, health and safety measures under the rules of the trade agreements. The agreements allow another country

to challenge as infringing the trade rules U.S. environmental, health or safety law that inhibits the other country's trade opportunities with the United States. If judged by a trade dispute panel to be in conflict with the trade rules, the United States would be ordered to stop enforcing such U.S. laws against the complaining party, or the United States would face trade sanctions. This could be the fate of U.S. environmental, consumer or health laws passed by Congress or state or local legislative bodies, of regulations derived from such laws and of laws enacted through popular referendum.

Second, the current trade regime presents a more subtle detriment to a country's establishing, maintaining and enforcing strong environmental, health or safety measures or raising the level of such protections. Under the current trade regime, products of U.S. companies which are complying with environmental, health and safety laws are put at a competitive disadvantage to products imported by companies not required to meet the same product or process standards.

When making this argument, environmental and consumer advocates working on trade policy have been criticized for ignoring issues of national sovereignty; namely, we are asked why we think the United States should be able to make decisions about environmental and consumer protection levels for other countries. Our argument is not about what other countries should do in reference to their own domestic standards. Rather, our concern is that trade policy should in no way inhibit the effective operation in the United States of our environmental and consumer protections. Thus, to effectively establish U.S. standards, policy makers must have available the tools to enforce our laws. They must also ensure that businesses which comply with U.S. laws are not placed at a competitive disadvantage to those who do not comply. Thus, the U.S. must be able to control access to our market by either banning or in some way equalizing the cost of products that do not meet our standards. From an environmental standpoint, this means making it competitively possible for U.S. industry to internalize the environmental costs that are required of them by U.S. law. From a consumer standpoint this means not giving a price advantage, and thus a market advantage, to producers who fail to bear the burden of the cost of their production—namely costs to the environment, worker safety and health that are externalized in other countries.

The combination of trade challenges, trade sanctions, threatened challenges and the competitive disadvantage of U.S. producers who follow current U.S. law established under current trade proposals will inevitably lead to increased pressure on U.S. policy makers to decrease the level of environmental, consumer and health protections.

B. GATT Articles Impacting Environmental, Health and Safety Measures

The trade values that conflict with environmental, consumer and health values are the basis of and are enumerated in the core Articles of the GATT. The NAFTA and any other subagreements must be compatible with the terms of the GATT. Thus, analysis of the environmental, health and safety implications of the GATT Articles is the starting place for consideration of the substantive environmental, health and safety impacts of trade policy.¹

GATT Article I establishes the rule of "Most Favored Nation" treatment. Under the principles of Most Favored Nation treatment, one GATT country may not discriminate between domestic products and "like products" imported from another GATT contracting party. "Like products" has been defined in GATT jurisprudence and in a 1971 paper prepared by the GATT Secretariat to be limited to consideration of product characteristics and does not allow consideration of how a product is produced or harvested.²

Thus, as demonstrated in the GATT tuna-dolphin ruling, the U.S. will not be allowed to limit importation of products which because of their production or harvest method may have detrimental effects on the environment. Article I additionally forbids

¹ We recommend the WWF-World Wide Fund for Nature (formerly the World Wildlife Fund) discussion paper of Charlie Arden-Clarke for a more detailed discussion of GATT and environmental protection and sustainable development. (Arden-Clarke, WWF International, Discussion Paper: The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development, Revised November 1991, ISBN 2-88085-086-X.)

²Report of the Panel, United States -- Restriction on Imports of Tuna, GATT Doc. No. DS21/R (September 3, 1991.) panel Decision Concerning U.S.; Note by the GATT Secretariat, GATT, Industrial Pollution Control and International Trade, 1971.

use of more subtle instruments such as quotas, differential tariffs or taxes. The notion of "like product" has recently been raised in the food context as relates to a pending ban on ozone-depleting post harvest fungicide fumigants which leave no residue on foodstuffs, but harm the environment. The "like product" issue would also be triggered by laws limiting importation of goods produced using child labor, as noted by representatives of the Office of the General Counsel of the USTR's Office in a September 17, 1991 hearing on the tuna-dolphin case held by the House Energy and Commerce Committee Subcommittee on Health and Environment which Chairman Studts attended.

GATT Article III sets out the principle of "National Treatment." Under this concept, one GATT country may not use tariffs, taxes or any regulations to provide different treatment to domestic goods than it would provide imports. The goals of this GATT Article was to stop the use of trade restrictions to protect domestic industries. The implications for U.S. environmental and consumer protection is that the U.S. is limited in taking action either through differential tariffs or taxes to improve the competitiveness of U.S. industry required by law to internalize certain environmental costs and comply with worker health and safety laws not required in the countries of competing producers.

GATT Article XI reinforces the notion of national treatment set out in Article III by specifically eliminating the use of bans, quotas or licensing systems on exports or imports. Under this section, measures to restrict the export of raw natural resources, such as the raw log bans established under Washington and Oregon state law and federal law could be held to violate the GATT. In fact, the U.S. raw log bans have been threatened by GATT challenges in the press.³ The European Community has requested consultations under GATT's dispute resolution mechanisms about a raw tropical timber export ban in Indonesia. The Philippines has a similar law. Similarly, efforts by certain European nations, most notably the Netherlands, to restrict imports of unsustainable harvested tropical timber may be held invalid under GATT. Unofficial reports indicate that a preliminary evaluation of the measure by the Dutch Ministry of Economic Affairs

³Journal of Commerce, "Japan Threatens U.S. Raw Log Bans."

concluded that the proposed bans, which is to come into effect on January 1, 1995, is incompatible with Article XI of the GATT.⁴

GATT Article XVI defines the limitation on governmental use of subsidies, thus limiting an alternative method for equalizing the competitive effect of compliance by U.S. industry with environmental, health and safety measures. Article XVI states that if a subsidy "operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory," it must inform all other GATT countries. If any nation objects, than the U.S. would be required to negotiate reduction or elimination of such a subsidy. This Article exposes a country that subsidizes pollution reduction or control measures, for instance through tax credits or other preferential treatment, to challenge by other GATT countries with a competing industry.

Exceptions to these general rules are provided mainly in GATT Article XX, which includes everything from exceptions for national security and slave labor to exceptions for the protection of human, animal and plant life and health. Article XI additionally includes one specific short term exception to export limitations for critical shortages of food or "other products" essential to the exporting country. The exceptions of Article XX allow for trade measures which would otherwise conflict with the basic GATT rules, so long as these measures do not "discriminate between countries where the same conditions prevail, or are a disguised restriction in international trade."

GATT Article XX(b) allows for "measures necessary to protect human, animal and plant health or life." The clause was originally intended for agriculture quarantine and other sanitary regulations.⁵ Although it does not specifically mention the environment, environmentalists had hoped that it could be used to update the GATT's notion of exceptions to include measures taken for environmental protection. Such hopes were largely dashed by the 1991 GATT ruling in the tuna-dolphin case, the first formal case in GATT's history Article XX was offered to support an environmental defense. The

⁴Arden-Clarke, p.15.

⁵GATT, Export of Domestically Prohibited Goods and other Hazardous Substances, DPG/W/6, 1990.

tuna-dolphin case held that Article XX could not be used in defense of extraterritorial measures, a question that had not been settled up to the tuna-dolphin panel ruling. This jeopardizes, under GATT, numerous U.S. environmental and conservation measures, including many under the jurisdiction of this committee such as the Endangered Species Act, whale protection measures, and the ivory ban. The limitation on extraterritoriality is also specifically incorporated in both the NAFTA and Uruguay Round texts on Sanitary and Phytosanitary Standards and Technical Barriers to Trade which are defined as only applying to measures taken within a country's geographic boundaries.

Additionally, the notion of "measures necessary to protect" has been interpreted, both in the tuna dolphin case and in other GATT panel decisions, to require that a measure taken must be the "least trade restrictive" measure possible to accomplish a GATT legitimate end. Thus, in the tuna-dolphin case, the panel held that the U.S. failed to prove that some less trade restrictive means to accomplish its dolphin protection goal did not exist. The principles of "necessary" and "least trade restrictive" are specifically incorporated in both the NAFTA and Uruguay Round texts on Sanitary and Phytosanitary Standards and Technical Barriers to Trade.

GATT Article XX(g) allows for "measures relating to the conservation of exhaustible natural resources if such measures are to be made in conjunction with restriction on domestic production and consumption." The main GATT jurisprudence on this exception prior to the tuna-dolphin case was in relation to a 1987 dispute panel in which the United States challenged a Canadian ban on the export of unprocessed herring and salmon. The United States argued that the goal of the law was to protect the British Columbia fishing industry, in violation to GATT Article VI. The Canadians argued that the ban was a core element of the Canadian West Coast fishery conservation and management plan. The dispute panel ruled that the ban was contrary to Article VI, and that no exception was available under Article XX(g) because conservation was not the primary goal of the law. This ruling brings into question the applicability of Article XX(g) for measures with mixed environmental and commercial goals, including the raw log bans in the Pacific Northwest.

The tuna-dolphin panel further limited the application of Article XX(g) to

environmental measures by holding that Article XX(g) did not have extraterritoriality application and that the limitation on consideration of process standards would also apply. Further, the tuna-dolphin panel report concluded that a country may not restrict trade in one product to accomplish a goal pertaining to another product -- namely tuna to protect dolphins. Article XX(g) would have been the likely defense if the Packwood-Magnuson Amendments to the Fisherman's Protective Act were challenged under GATT. However, the tuna-dolphin case effectively eliminates the usefulness of that defense.

GATT Article XX(h) allows for waivers "undertaken in pursuance of obligations under any intergovernmental commodity agreement," which is relevant to certain commodity agreements such as the International Tropical Timber Agreement which includes conservation and sustainable management goals. Environmental advocates have hoped that this exception might be extended to include international environmental agreements and protocols. However, such an extension was not part of the Uruguay Round Draft Final Act Text. To the contrary, a GATT Committee on Trade and Environment is currently discussing the trade conflicts problems raised by three major environmental agreements -- the Convention on International Trade in Endangered Species, the Montreal Protocol on the Ozone Layer and the Basel Convention.

When a GATT country fails to follow the rules established in the GATT Articles, GATT provides dispute resolution to challenge such behavior, and allows trade sanctions when a law is found by a GATT dispute panel to be in conflict with the GATT rules unless a country withdraws such a law. Article Number VI establishes the rules for one GATT country to retaliate against another; and specifies the countervailing duties that can be used. These countervailing measures are based on comparison of product costs which do not take into account the extent to which environmental or worker health or safety costs have been externalize. The failure of the GATT to recognize these differences amounts to what several environmental advocates have called an "environmental subsidy" of "allowing polluters to freely appropriate and/or degrade common resources such as the air and water."⁶

⁶Arden-Clarke, p.13.

While multilaterally negotiated solutions to such thorny issues as internalization of environmental costs are clearly the best option for the future, in the interim countries must have available the tools to effectively enforce their domestic environmental measures. This includes leveling the anti-competitive effect compliance with environmental, health and safety measures currently has on domestic industry by considering differences in production process as part of "like product" definition and putting in place differential tariffs or taxes or subsidies for affected domestic industry. Additionally, in the absence of multilateral environmental agreements, countries must maintain their ability to unilaterally take actions relating to access to their markets to protect extraterritorial resources.

As the following section discusses, current trade policy-making and dispute resolution procedures also conflict with the procedural values and norms of environmental, health and safety policy-making.

II. The International Trade Arena Is an Inappropriate Forum for Resolution of Environmental, Health and Safety Issues.

Public Citizen is striving to ensure that international trade agreements do not undercut domestic consumer protection and environmental laws. Since its founding in 1971 by Ralph Nader, Public Citizen has worked to strengthen domestic consumer and environmental protections. We have had many successes, but have faced industry groups that have fought against stronger standards and have tried to weaken the protections that are currently in place. International trade agreements are providing industry a more preferential forum in which to challenge those standards. That forum, moreover, does not afford citizens the same rights of access to information and to the decision making processes that they have domestically.

A. Secrecy

First, in contrast to U.S. legislative and rule-making processes, international trade

negotiations are cloaked in secrecy. The recent NAFTA negotiations are a case in point. Indeed, some Members of Congress have called the NAFTA negotiations the most secret ever.⁷

Not only do environmental and consumer advocates not have meaningful access to information as negotiations are underway, but when draft trade agreement texts are completed, they are not available to the public. Despite strenuous efforts throughout the course of the NAFTA negotiations, Public Citizen was only able to obtain one draft text and at a different time several draft sections when disgruntled negotiators leaked copies. Though it was officially released by GATT in Geneva in December 1991, the Dunkel text was not available to U.S. press until two days later. To obtain a copy of the "Dunkel" Uruguay Round Draft Final Act text in a timely manner, Public Citizen had to arrange for a copy obtained by a journalist from the GATT press office to be flown at its expense from Switzerland. Had we not made it available to the press ourselves, the coverage of the December 1991 Uruguay Round text would have been based solely on summaries provided by the Bush Administration.

In order to focus attention on flawed elements of the on-going negotiations, Public Citizen has made available draft copies of the text when ever it has been able to obtain them.

Public Citizen has received continual criticism from trade officials for making public draft texts. However, the impact of having access to such information has been demonstrated by the course of negotiations. For instance, Public Citizen obtained a copy of the NAFTA dispute resolution text which contained many of the problems environmental and consumer advocates had criticized in the Uruguay Round text. It has been suggested by trade officials sympathetic to citizens' concerns that Public Citizen's critique, which received attention in the press and in Congress, was an important reason for changes in the final NAFTA dispute resolution text which make that text, though still deeply flawed, an improvement over that of the Uruguay Round. Had environmental

⁷ See, e.g., Remarks of Congressman Richard A. Gephardt, Address Before the 21st Century Conference (Sept. 9, 1992).

advisory groups with greatest influence on environmental and consumer health and safety issues in trade negotiations had among the worst environmental records within U.S. industry. For instance 5 members of the advisory committees are listed in EPA's 1989 Toxic Release Inventory database as ranking among the 10 biggest dischargers of hazardous waste in America: Du Pont, the biggest polluter in America; Monsanto, the second biggest; 3M, the sixth biggest; General Motors, the eighth biggest; and Eastman Kodak, the ninth biggest.¹⁰ Similarly, as of January 1, 1990, 50 companies (or their affiliates) represented in the advisory committees, nearly half of all trade advisors in the study, were listed as Potentially Responsible Parties for hazardous waste dumps on EPA's Superfund List. Although more than one company may share responsibility for polluting a Superfund site, each of these 50 offenders is at least partially responsible for an average of more than 11 different Superfund sites.¹¹

In response to public and congressional objections at this skewed representation expressed during the 1991 debate over extending fast-track authority, the Bush Administration appointed representatives of environmental organizations to five trade advisory committees. The five organization appointed had been neutral towards or supportive of Bush Administration trade policy; groups such as the Sierra Club, Friends of the Earth and Greenpeace who had been highly involved in the issue but more oppositional to Bush trade policy were excluded. No representatives of consumer or health organizations were named. The remaining committees still lack any environmental, consumer, or public health representation. Moreover, the five individuals who serve on the trade advisory committees are prevented by secrecy rules from sharing any of the information that they gain through their service on the committees, even with their own staffs.

¹⁰ Toxics in the Community: National and Local Perspectives. The 1989 Toxics Release Inventory National Report. Report, Economics and Technology Division, Office of Toxic Substances, U.S. Environmental Protection Agency. September 1991. p. 66. January 1, 1990.

¹¹ Site Enforcement Tracking System. database of U.S. Environmental Protection Agency. January 1, 1990.

Given that more than 800 industry representatives serve on these committees, while only five environmental representatives do, industry interests have obtained more information about the NAFTA and Uruguay Round negotiations, and have had far greater opportunities to provide input into those negotiations than the few environmental representatives. Moreover, it should be noted that John Adams, Executive Director of the Natural Resources Defence Council, the environmental representative to one advisory group, the Services Policy Advisory Committee, issued a dissenting opinion from that committee's endorsement of the NAFTA, based on his opinion that the NAFTA did not adequately address key environmental concerns.

Public Citizen has formally requested the United States Trade Representative's Office to make additional appointments of consumer, health and environmental representatives to the trade advisory committees.¹² But the Office took the position that no such representation is legally required, and it has thus refused to make any additional appointments. Virtually all of the meetings of the trade advisory committees are held in closed session, and the Office routinely withholds their records from the public. The secrecy that pervades the trade advisory process cuts the public out of the establishment of the standards that may dictate the future viability of U.S. environmental, health and safety standards.

C. Fast Track Limits Congress' Role

Third, the fast-track approval process limits Congress's ability to scrutinize and modify trade agreements. Thus, under fast-track procedures, no amendments to the implementing legislation or the trade agreement are permitted¹³, debate in either House is limited to not more than 20 hours¹⁴, and a floor vote must be taken within 60 to 90

¹²See Letter to the Office of the U.S. Trade Representative from Patti Goldman, Public Citizen (Dec. 16, 1991); Letter to Public Citizen from Joshua Bolton, General Counsel, Office of the U.S. Trade Representative (February 3, 1992).

¹³19 U.S.C. § 2191(d)

¹⁴19 U.S.C. § 2191(f)(2) & (g)(2).

legislative days of the submission of the agreement to Congress.¹⁵ In other words, the implementing legislation must be adopted by a "yes" or "no" vote within 60 to 90 legislative days of its submission by the President.

The current five year fast track authority established in the 1988 Omnibus Trade and Competitiveness Act expires on June 1, 1993. The Clinton Administration has announced its intent to request new fast track authority from Congress. Public Citizen is opposed to fast track on principle because of its antidemocratic nature.¹⁶ The fundamental democracy deficit of fast track is made most relevant by the expansion of trade negotiations into the very policies — environmental and consumer protection — the development of which have been most benefitted by wide public participation and involvement.

D. USTR Refuses to Prepare Environmental Impact Statements

Fourth, the Office of the U.S. Trade Representative has refused to prepare environmental impact statements for trade agreements, even though such statements have been prepared for many domestic matters that will be undermined by the agreements, and for other international agreements, such as the Panama Canal Treaty and the Montreal Protocol on Depletion of the Ozone Layer. The Clinton Administration has not shown that it will reverse the policy of arguing that NEPA does not apply to international trade.

Public Citizen, on behalf of itself, the Sierra Club and Friends of the Earth,

¹⁵Normally, congressional committees to which the implementing bill is referred have 45 legislative days to review the matter, at which time it is automatically referred to the full House, and a floor vote must then be taken within 15 legislative days. (19 U.S.C. §2191(e).) However, where the implementing legislation contains revenue measures, the approval period may be extended from 60 to 90 legislative days because revenue measures must originate in the House of Representatives, and additional time may be added to permit Senate committee consideration after referral of the matter from the House. (*Id.* §2191(e)(2).)

¹⁶Hilliard and Wallach, Public Citizen's Congress Watch, The Consumer and Environmental Case Against Fast Track, March 1991.

initiated a suit to compel compliance of USTR with the National Environmental Policy Act (NEPA) which requires Environmental Impact Statements for all major federal action which effect the environment or health.¹⁷ Our initial NEPA suit was held not to be ripe because trade negotiations had not been completed for the NAFTA and Uruguay Round.¹⁸ We refiled our case limited to NAFTA immediately after the NAFTA negotiations were completed.¹⁹ That case awaits argument in the District Court for the District of Columbia.

USTR's refusal to prepare an environmental impact statement on the NAFTA has deprived the public and the Congress of an objective analysis of NAFTA's environmental effects. What the negotiators have conveyed has been more of a one-sided, political endorsement of the Agreement designed to conceal any of its adverse environmental or health consequences. A superficial analysis of environmental effects of the NAFTA prepared by the Bush Administration in response to Congressional pressure failed to meet the requirements of NEPA.²⁰ Additionally, the Bush Administrations "Review of U.S.-Mexico Environmental Issues" is premised on the assumption that there would be little relocation of U.S. companies to Mexico because of the NAFTA. Thus, the conclusion of the report predictably was that environmental impacts of NAFTA would not be great.

While many nongovernmental organizations have done detailed analysis of the possible environmental, health and safety effects of both NAFTA and the Uruguay Round Draft Final Act Text, the government has available the information and analytical resources to most comprehensively study such impacts. Without such full analysis, Congress will be asked to vote to approve trade agreements about which the public has increasing environmental and health concerns without benefit of basic, vital information

¹⁷Civil Action No. 92-5010.

¹⁸970 F. 2d 916 C.D.C Air 1992).

¹⁹Civil Action No. 92-2102.

²⁰U.S.T.R., Review of U.S.-Mexico Environmental Issues, January 1992.

on environmental, health and safety impacts of the agreement.

E. NAFTA and GATT Dispute Resolution Weighted Against Environmental and Consumer Interests²¹

Fifth, trade challenges will be resolved in a dispute settlement system that contrasts sharply with the open, administrative and judicial systems for resolving challenges to food safety measures domestically. Both the NAFTA and the proposed Uruguay Round dispute settlement processes can give rise to automatic trade sanctions, if the parties do not agree on how to resolve the dispute in light of the panel's decision.²² In contrast to the current dispute resolution provisions of GATT, no separate authorization for trade sanctions is required to permit a party to impose such sanctions under the NAFTA and Uruguay Round proposals. These trade sanctions may continue until an agreement is reached on a resolution of the dispute, which will, in all likelihood, place pressure on the losing party to change the offending measure.

Both the Uruguay Round and NAFTA mandate that the dispute settlement process be conducted in secret. Thus, NAFTA provides that the "panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."²³ The Uruguay Round Final Act Text states, "written memorandum...shall be considered confidential...Panel deliberations shall be secret..."²⁴ Moreover in NAFTA, the panel is prohibited from disclosing which panelists are associated with majority and minority opinions.²⁵

This secrecy prevents domestic proponents of health and environmental measures

²¹For more details on NAFTA and Uruguay Round proposals on dispute resolution, see Annexes 1 and 2.

²²NAFTA Articles 2018-2019, Uruguay Round Draft Final Act, Chapter "S" para 20.1.

²³NAFTA Article 2012(1), at 20-10.

²⁴Uruguay Round Draft Final Act, Chapter "S", para. 12.1-12.2.

²⁵NAFTA Article 2017(2), at 20-12.

that are being challenged from obtaining sufficient information about the proceeding to provide input into it. Such individuals are not permitted to participate in the proceeding as parties or amici. As a result, the only way that they can provide input is by giving it to the country defending the measure. However, if they are kept uninformed as to the arguments being made, the timing of the submissions, and possibly even the fact of the dispute, they cannot provide that input to their government. Moreover, such individuals cannot determine whether their government is mounting a strong legal defense of the measure, nor can they put pressure on their government to make a stronger showing, without access to its submissions.

When Public Citizen has sought access to the United States' submissions to GATT dispute panels under the Freedom of Information Act, the Office refused to release them until after the proceeding had concluded. In Public Citizen's challenge to the Office's refusal to make such submissions immediately available to the public, the district court held that the Office's practice was illegal because it was not mandated by the GATT itself.²⁶ The NAFTA would likely preclude the United States from making its own submissions available to the public under existing domestic access laws.

International trade dispute bodies have traditionally been composed of trade specialists who view domestic environmental and health measures with suspicion. The NAFTA charges Parties with establishing a roster by consensus of individuals who "have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements"²⁷ The Uruguay Round lists the qualifications of panelists as, "persons who have served on or presented a case to a GATT panel, served as a representative to the GATT or in the GATT Secretariat, taught or published on in international trade law..."²⁸ It is theoretically possible for an environmental lawyer with expertise in the Montreal

²⁶Public Citizen v. Office of the U.S. Trade Representative, No. 92-659-GAG (D.D.C. Nov. 1992), appeal dismissed, (Jan. 1993).

²⁷NAFTA Article 2009(1) & (2).

²⁸Uruguay Round Draft Final Text Act, Chapter "S", para. 6.1.

Protocol or a consumer advocate with expertise in food safety law to be placed on one of these rosters. However, that is unlikely since the roster is drawn up for trade disputes generally and the countries would be more likely to select trade experts, in the tradition of the past GATT and U.S.-Canada Free Trade Agreement panels. Moreover, since under NAFTA panelists selected from outside the roster may be vetoed by the other Party to the dispute, an environmental or food safety advocate would be unlikely to be selected to serve on a panel dealing with their areas of expertise.²⁹ In addition, although NAFTA panelists are required to comply with a code of conduct to be established in the future by the North American Free Trade omission,³⁰ there are no requirements in the NAFTA that the code of conduct limit or require disclosure of panelists' conflicts of interest or other significant biases.

Trade tribunals have historically lacked the ability to obtain the expertise necessary to address complex scientific determinations relating to health and environmental measures. The NAFTA specifically allows with the permission of all Parties, but does not require, panels to seek information and technical advice from outside individuals and bodies.³¹ Because this is optional, rather than mandatory, it does not ensure that the panels can obtain needed expertise through this device. The Uruguay Round similarly allows, but does not require, such consultation.³²

The NAFTA also permits a panel to request a report of a science board on factual issues concerning environmental, health, safety or other scientific matters raised in a trade dispute.³³ Again, the panel may, but is not required to seek such a report, even if one of the disputing parties requests it. Moreover, the disputing parties may disapprove such a request, in which case the panel may not seek such a report. The

²⁹NAFTA Article 211(3).

³⁰NAFTA Article 209(c).

³¹NAFTA Article 214.

³²Uruguay Round Draft Final Text, Chapter S, para. 11.

³³NAFTA Article 215(1).

ability of a panel to seek such a report is further limited by the requirement that it address factual issues only. This may limit a panel's ability to seek a report on the effectiveness of various means of regulating a particular matter. Moreover, NAFTA Article 2015(2) requires that the science review board be composed of independent experts, but it contains no guarantees that the board will be balanced in terms of the viewpoints or backgrounds of the members. Finally, it is unclear what is meant by the requirement that the panel shall take the board's report, along with the parties comments on it, into account in preparing its own decision.³⁴ The Uruguay Round Draft Final; Text does not contain any related provision.

The NAFTA dispute settlement provisions provide that a country whose measures are challenged may elect to have certain disputes that arise under both NAFTA and GATT resolved under NAFTA.³⁵ This right exists with respect to actions subject to international environmental agreements incorporated into NAFTA Article 104, which is essential to give NAFTA Article 104 meaning, since the GATT does not protect trade measures taken under such agreements. This right also extends to food safety and technical measures adopted to protect health or the environment, where the dispute raises factual issues concerning the environment, health, safety, or conservation. It is not clear the extent to which this reference to factual issues will limit the range of food safety and technical disputes that must be resolved under NAFTA, and the effect such a limitation will have. However, for non-factual issues arising under the named provisions, as well as for trade challenges involving environmental and consumer protections that are not covered by the noted chapters, the challenger has the right to decide whether the dispute will be resolved under the GATT or the NAFTA, and presumably in most cases, the challenger will opt for the GATT, because it has fewer safeguards than the NAFTA for such measures and no mechanism for obtaining scientific input.

³⁴NAFTA Article 2015(4).

³⁵NAFTA Article 2005(3) & (4).

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³⁴NAFTA Article 2015(4).

³⁵NAFTA Article 2005(3) & (4).

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As this discussion shows, the international trade system is poorly suited to address environmental health and safety policy. Its secrecy deprives the public of meaningful input into the process, while at the same time, industry has secret, inside influence. This imbalance is amplified by the limited role given Congress under the fast track procedure. The negotiators and dispute settlement bodies have an inherent bias against environmental, health and safety measures, which are viewed as restraints of trade. For these reasons, the United States must not allow the international trade system to restrict its authority to establish environmental, health and safety protections that respond to current needs and whatever problems arise in the future.

III. NAFTA and the Uruguay Round Unduly Restrict Environmental, Health and Safety Protections.

Historically trade negotiations and trade disputes addressed matters, such as tariffs, that seemed purely economic in nature. Now, under the concept of non-tariff trade barriers, trade agreements have begun to focus more directly on legitimate health, safety, and environmental measures that have impacts on trade.

For example, the Tokyo Round of GATT, which concluded in 1979, developed the Agreement on technical Barriers to Trade to product standards, testing, labeling, and packaging schemes, including those designed to protect health, safety, or the environment. Similarly, in recent years, many countries have invoked the GATT and the United States-Canada Free Trade Agreement to call into question such health and environmental laws as restrictions on cigarette advertising and promotion, a ban on smokeless tobacco products, a phase-out of asbestos, a ban on hormone-treated beef, and fuel economy standards.³⁶ Both the NAFTA and the Uruguay Round negotiations

³⁶Mintz, "Tobacco Roads: Delivering Death to the Third World," The Progressive at 24 (May 1991); Council on Scientific Affairs, "The Worldwide Smoking Epidemic: Tobacco Trade, Use & Control," 263 JAMA 3312 (June 27, 1990); GATT Panel Report, Thailand Restrictions on Importation of & Internal Taxes on Cigarettes, BISD, 37th Supp. (adopted Nov. 7, 1990); Letters from U.S. Ambassador Re: U.K. Moist Snuff Ban (1990 & 1991); U.K.-U.S. Tobacco Co. Agreement Re: Moist Snuff (1991); Brief of Amicus

continue this trend in the development of provisions under which domestic environmental, health and safety regulations may be challenged as nontariff trade barriers.

A. Some Environmental and Health Implications of the Uruguay Round Negotiations of GATT

Public Citizen mainly has focussed on three issues in the Uruguay Round GATT negotiations – consumer and environmental standards, the establishment of a new global commerce agency called the Multilateral Trade Organization (MTO), and dispute resolution. This section of our testimony will briefly discuss these issues. Please see Annex 1 attached for more detail on these issues. Further, other important issues exist in reference to the Uruguay Round for which we refer the committee to the following authors whose articles and reports are also available through Public Citizen:

- the environmental implications of the Uruguay Round's macroeconomic effects and incentives -- John Audley, Sierra Club, Washington, D.C.;
- the effect on sustainable agriculture of the Uruguay Round's inclusion for the first time of agricultural trade -- Mark Ritchie, Institute for Agriculture and Trade Policy, Minneapolis, Minnesota and Tim Lang, Parents for Safe Food, London, England;
- the effect of the Uruguay Round on the principles of sustainable development -
- Alex Hittle, Friends of the Earth, Washington, D.C. and Charlie Arden-Clarke, WWF International, Gland, Switzerland;
- the undermining of UNCED principles by the Uruguay Round -- Greenpeace International, "UNCED Undermined" available through Greenpeace, USA, Washington, D.C.;
- the detrimental effects on biodiversity of the Uruguay Round's Intellectual Property provisions -- Vandana Shiva, Third World Network, Penang, Malaysia;

Application of Health Regs. to Agric. Trade, 14 N.C.J. Int'l L. & Com. Reg. 135 (1989);
Services of the Commission of the European Communities, Report on U.S. Trade Barriers & Unfair Trade Practices at 34-37 (1991)

- Uruguay Round implications for global forest protection –Rain Forest Action Network, San Francisco, CA.

On Dec. 20, 1991, Gatt Director-General Arthur Dunkel released a comprehensive Draft Uruguay Round Final Act Text which contained completed language, without brackets, for every subject negotiated in the Uruguay Round.

The Draft Final Act Text Standards provisions promote downwards harmonization and mandate affirmative preemption of non-compliance state and local laws (New language requires federal governments to take affirmative measures to bring their subfederal governments into GATT compliance in these areas.)

GATT dispute resolution has been dramatically amended through the Uruguay Round. Unless an appeal is filed or there is unanimous consensus among the 108 GATT parties to stop adoption of a GATT panel ruling within 60 days, panel rulings are automatically adopted. If an appeal is taken, 30 days after the decision is published it is automatically adopted, unless there is consensus to stop it. Absolute secrecy of panel hearings and documents to which many of us had objected in earlier drafts was maintained in the Final Act.

The Uruguay Round would create a new global commerce agency called the Multilateral Trade Organization (MTO) which, unlike the GATT, has "legal personality" like the United Nations. The proposed MTO would have as its rules GATT as updated by the Uruguay and Tokyo Rounds, plus the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Intellectual Property (TRIPs). The MTO proposal requires nations to cede substantial sovereignty, for instance requiring MTO member nations to "take all necessary steps, where changes to domestic laws will be required to implement the provisions...to ensure conformity of their law with these Agreements. However, the MTO proposal contains no provisions to safeguard environmental or consumer protections to promote sustainable investment or use of natural resources. We see the MTO as providing greater enforcement of bad GATT rules. Without fundamental reforms to the [procedural and substantive principles and Articles of GATT itself, we do not feel that grating any additional power to such a trade body is merited.

Finally, nothing is done in the Final Act to "fix" the damage done to GATT Article XX by the tuna-dolphin panel decision, and in fact some of the worst aspects of the decision are incorporated in the Uruguay Round Standards provisions.

In summary, the Uruguay Round Final Act text is not acceptable from an environmental and consumer health and safety standpoint. The text was rejected by 29 national environmental, consumer, conservation and animal welfare groups in January 1992 who called for Congress to reject the text if it brought for approval. The Clinton Administration has the opportunity to address the many flaws of the Uruguay Round, but must make clear now that they do not intend to accept a Uruguay Round without the environmental, consumer and democracy flaws repaired.

B. Some Environmental and Health Implications of the NAFTA

As with the Uruguay Round, Public Citizen mainly has focussed on two issues in the NAFTA negotiations – consumer and environmental standards and dispute resolution. This section of our testimony will briefly discuss these issues. For more detail on these issues in NAFTA, especially focussing on food safety which is an issue that has not received the attention it merits in past NAFTA discussion. We refer you to Annex II.

Many other issues of equally vital importance exist for which we refer the committee to the following authors whose articles and reports are also available through Public Citizen:

- environmental impacts of the macroeconomic effects of NAFTA – John Audley, The Sierra Club, Washington, D.C.;
- NAFTA's undermining of environmental sound energy policy – Ken Stump, Greenpeace USA, Washington, D.C.;
- NAFTA's impact on sustainable agriculture – Karen Lehman, Institute for Agriculture and Trade Policy, Minneapolis, MN;
- NAFTA's detriment to biodiversity – Beth Burrows, Washington Biodiversity Action Committee;

- NAFTA's undermining of natural resource and conservation policy – Steven Shrybman, Canadian Environmental Law Association, Toronto, Canada.
- NAFTA and Wildlife Trade – World Wildlife, Washington, D.C. (two volumes);

Unfortunately, both in what it contains and what it omits, the September 6, 1992 text of the North American Free Trade Agreement is not good news for environmental or consumer health and safety protection. The terms of the NAFTA text expose numerous existing U.S. federal, state and local environmental and consumer laws to challenge as nontariff trade barriers under chapters on Sanitary and Phytosanitary Standards and Technical Standards. The standards provisions also create downward pressure on industrial and agricultural worker safety standards in the United States. Further, NAFTA would promote environmentally unsound commercial activity in the areas of agriculture, energy and in the incentives it creates for manufacturers to relocate to Mexico to avoid strict enforcement of environmental regulation. All of these problems are intensified by the absence in the NAFTA of enforcement or funding provisions for environmental protection. Moreover, the NAFTA text establishes highly secretive negotiation and dispute resolution processes that deny citizen oversight of NAFTA on vital citizen concerns such as food safety, consumer product standards and environmental regulations on hazardous substances.

The NAFTA text that President Bush signed on December 18, 1992 does not measure up. The Bush Administration did take some very limited steps in the NAFTA to address environmental and consumer health and safety criticisms made about the Draft Final Act text of the Uruguay Round of GATT. However, the September 6 NAFTA text does not measure up to the consensus position on minimal environmental safeguards signed by 40 U.S., Mexican and Canadian environmental and consumer groups presented to the Bush Administration in May 1992, nor to consensus documents presented throughout the negotiation process, signed by American groups.

The environmental shortcomings of the NAFTA were identified by President Clinton during his campaign in an October 3, 1992 speech on NAFTA. On March 5, 1993, over a dozen U.S. national environmental, consumer, conservation, animal protection and

sustainable agriculture groups including Public Citizen sent a joint letter to US Trade Representative Mickey Kantor laying out in detail both what was missing from the NAFTA from an environmental, conservation, health and safety viewpoint and what fundamental problems were contained in the existing NAFTA text.

President Clinton is in an unenviable position on the NAFTA. He has inherited a NAFTA that is fundamentally flawed in its text, missing important aspects and reliant on the fast track mechanism for Congressional consideration of the NAFTA that was extended on the basis of promises to the Congress that were not kept. We were pleased to see that President Clinton recognized that the Bush NAFTA did not pass muster from an environmental and consumer protection. We hope that President Clinton takes the necessary steps to put in place the numerous necessary additions and changes to the Bush NAFTA.

IV. Public Citizen's Recommendations for Neutralizing the Detrimental Impacts of Current Trade Policy on Environmental, Health and Safety Protections.

A. General Recommendations

1. Procedural Safeguards

- Conduct Environmental Impact Statements for all trade agreements, as required by the National Environmental Policy Act.
- Develop a Code of Ethics for U.S. trade negotiators which would pertain to U.S.T.R. and any other government officials involved in trade policy.
- Open trade negotiations and dispute processes to the sunshine of public oversight by creating processes through which citizens can access information.
- Allow increased participation of citizen representatives throughout the trade policy-making and dispute settlement processes.
- Provide mechanisms for citizen enforcement of environmental, health and other social laws against U.S. corporations doing business in other countries by establishing citizen standing in trade dispute mechanisms.
- Enact a Foreign Environmental Practices Act compelling U.S.-based corporate operations in other nations to follow U.S. environmental standards.

- Step up border food inspection of produce, meats, dairy and poultry.

2. Make Dispute Resolution More Open, More Fair, and More Sensitive to Consumers and the Environment

- Ensure the burden of proof in trade challenges is on the challenging party.
- Limit the role of science to informing the political decisions of risk management.
- Establish a separate dispute resolution mechanism outside of GATT for environmental and consumer cases which would provide procedural and substantive rules favorable to environmental and health goals.

B. NAFTA Recommendations

Public Citizen's specific recommendations for NAFTA are contained in the attached consensus letter to USTR Mickey Kantor (See Annex III.)

C. GATT Recommendations

Following are some of our GATT recommendations. We strongly believe that the Uruguay Round should not go forward until its threats to environmental and consumer protection are neutralized:

1. Improve Environmental, Health, and Safety Protection

Establish the effective ability for countries to establish, maintain, enforce or raise their environmental or consumer protections by:

- Changing the general exception clauses in GATT Article XX and the definition of "like product" in the context of Article I Most Favored National treatment specifically to allow consideration of how a product is processed in determining the legitimacy of import restrictions. The Uruguay Round Sanitary Phytosanitary Standards and Technical Standards texts must also be modified to allow distinctions based on non-product related processes.
- Changing the general exception clauses of Article XX, Article VI, and the Uruguay Round Sanitary Phytosanitary Standards and Technical Standards texts to specifically allow long term export and import limitations for environmental, health and safety purposes.

- Changing the general exception clauses of Article XX and the Uruguay Round Sanitary Phytosanitary Standards and Technical Standards texts specifically to allow extraterritorial application of environmental, health and safety measures as long as they are facially nondiscriminatory in intent.
- Make the general test for environmental, health and safety laws that limit trade into line with general trade theories of nondiscrimination and national treatment so that the applicable test is simply whether such measures are facially nondiscriminatory in intent.
- Make clear the limitations in the role of science merely to informing the political decisions of risk management. The Uruguay Round must specifically allow environmental and consumer health and safety standards based on referendum or consumer preference in accord with the precautionary principle..
- Ensure that trade agreements meet the objective of sustainable development.

2. Procedural Safeguards

- De-link the MTO proposal from the Uruguay Round.
- Renegotiate a new multilateral trading system through procedures that guarantee openness and a role, as members of country delegations, for the non-governmental organizations representing citizens around the world.
- Begin national political debate to approve membership into any new global trading organization. For the United States, the decision to join such a new organization should be given treaty treatment, including two-thirds majority vote in the Senate.
- Place jurisdiction over issues of trade and the environment and trade's conflicts with other social and health measures with the existing U.N. agencies which encompass values beyond trade liberalization, such as UNCED and UNEP.

3. Make Dispute Resolution More Open, More Fair, and More Sensitive to Consumers and the Environment

- Modify the Uruguay Round Sanitary and Phytosanitary and Technical Standards sections to make clear that the burden of proof in trade challenges is on the challenging party. This should also be made clear in the Uruguay Round dispute resolution provisions.
- Establish a separate dispute resolution mechanism outside of GATT for

environmental and consumer cases which would provide procedural and substantive rules favorable to environmental and health goals.

V. Conclusion

The problems and issues presented in this testimony are complex. While environmental and consumer advocates have made great steps in identifying the problems with current trade policy, it is now the task of the Clinton Administration to propose specific alternatives and remedies. The Clinton Administration should be more hospitable to such changes than was the Bush Administration. We look forward to working with this committee and Congress to develop policies in this direction.



Buyers Up • Congress Watch • Critical Mass • Health Research Group • Litigation Group

Ralph Nader, Founder

ANNEX I

DETAILED ANALYSIS OF GATT SANITARY AND PHYTOSANITARY STANDARDS, AND MULTILATERAL TRADE ORGANIZATION PROVISIONS

I. URUGUAY ROUND SANITARY AND PHYTOSANITARY RULES ("SPS")

A. Coverage of SPS Rules

The Uruguay Round SPS provisions apply "to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade."¹

The definition of sanitary and phytosanitary measures that are covered includes "any measure applied:

-to protect animal and plant life or health within the territory of the contracting party from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying or disease-causing organisms²;

-to protect human or animal life or health within the territory of the contracting party from risks arising from additives, contaminant, toxins or disease-causing organisms, in food, beverages or feedstuffs³"

as well as measures to protect human life and health and limit other damage within the territory of a contracting party from diseases and pests⁴.

This definition includes "laws, regulations, requirements and procedures" including "end product criteria, processing and production methods; testing, inspection, certification and approval procedures...statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related

¹ Dec. 20, 1991 Final Act, L.36, para. 1.

² Dec. 20, 1991 Final Act, L.45, Annex A, para. 1.

³ Id.

⁴ Id.

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to food safety.⁵

1. Narrow Coverage of GATT Article XX (b)

In addition to the definition of "sanitary and phytosanitary measures", the text contains two other provisions that define GATT SPS coverage. Proposals on these two issues were the way in which environmental and consumer advocates suggested the SPS provisions could be used to limit the damage of the tuna-dolphin panel decision. Both suggestions pertained to broadening the reach of Article XX(b.) In each case, the opposite position is contained in the final SPS text.

First, the definition of "Sanitary and Phytosanitary Measure" could have been expanded so that environmental, animal welfare and consumer concerns related to health products could have been included among the GATT legitimate basis for sanitary and phytosanitary regulations that impact trade. This more expansive definition was put forth by the European Community and is strongly supported by their environmental and consumer communities, as well as many U.S. consumer and environmental groups.

The SPS final text does not include the broader definition and instead, above the heading of the SPS section is a note:

"In respect of the following Decision on Sanitary and Phytosanitary Measures, it had been proposed that consumer concerns with relation to health, as well as animal welfare, should be fully addressed by this Decision. Most participants, however, were of the view that only some aspects of consumer concerns related to health were within the scope of the Decision, and insisted that other consumer concerns, along with animal welfare, could most appropriately be dealt with through other instruments.⁶

It is unclear what "other instruments" the SPS drafters had in mind. These issues are not addressed in any other part of the Uruguay Round Draft Final Act Text.

Second, the coverage of Article XX(b) could have been reexpanded in the SPS text by specifically stating that sanitary and phytosanitary standards are only one subset of a more expansive Article XX(b). Instead, the text states just the contrary as a goal for the SPS provisions "[d]esiring to elaborate rules for the application of the provisions of the General Agreement which relate to the use of sanitary and phytosanitary measures, in

⁵ Id.

⁶ Dec. 20, 1991 Final Act, L.35, above headline.

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particular the provisions of Article XX(b).⁷

Finally, a third recommendation for repairing the damage of the tuna-dolphin case was to specifically give extraterritorial application to sanitary and phytosanitary standards. This, in combination with the proposals to expand SPS coverage to include environmental objectives, would have partially neutralized the tuna-dolphin decision's damage to environmental protection. Instead, the SPS text specifically limits SPS measures to "within the territory" of a nation.

B. Harmonizing Standards Downwards

The basic GATT SPS rule is that national standards which comply with international standards are presumed to meet GATT requirements.⁸ Such a presumption is very important in GATT because it determines which party must carry the burden of proof if a standard is challenged as an unfair trade barrier. In simple terms, the GATT rule is "guilty unless presumed or proved innocent." For instance, if a U.S. law stronger than the international standard is challenged, the U.S. must prove that the law is not an unfair trade barrier under GATT rules. Under this principle, the status quo or default position is that any law higher than an international standard is an unfair barrier to trade.

Nations may only maintain standards stronger than the international standards by proving that the national standard passes a series of restrictive tests laid out in the SPS text.⁹ Understanding under what circumstances the SPS text allows nations to have stronger standards is somewhat tricky, because different provisions of the SPS text limit and control each other. By fitting the provisions together, it becomes apparent that the SPS rules promote harmonization downward of national standards that are higher than international standards.¹⁰

⁷ Dec. 20, 1991 Final Act, L.36, preamble.

⁸ Dec. 20, 1991 Final Act, L.36, para. 8.

⁹ Dec. 20, 1991 Final Act, L.37, para. 11.

¹⁰ This conclusion is supported not only by the actual GATT SPS provisions contained in the Final Act, but by what is not contained in the Final Act. For instance, in the 1990 draft text, the first clause of the Basic Rights and Obligations allowed: "Contracting parties have the right to take sanitary and phytosanitary measures for the protection of human, animal, or plant life or health, including, when appropriate, measures more stringent than required by international standards, provided such

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C. GATT Chooses Codex Alimentarius for International Food Standards

The SPS text specifies which international standards will be deemed GATT-acceptable international standards.¹¹ The standards of the Codex Alimentarius Commission are chosen for food standards, including:

- rules for food inspection and sanitary handling,
- rules for pesticide, animal hormone, antibiotic and other drug residues and contaminants,
- rules for color, flavor, and other additives,
- rules for risk assessment and methods of analysis.

Two other specific organizations are named for animal and plant standards, and a Committee for Sanitary and Phytosanitary standards created in the SPS text is given the power to identify other organization and standards in the future.¹²

Many U.S. consumer and environmental standards are higher than the standards of the Rome-based Codex Alimentarius Commission. Codex, a joint subagency of the World Health Organization and the Food and Agriculture Organization, does not have standards for many of the pesticides and other contaminants that the U.S. regulates. Many of the standards that Codex does have are lower than U.S. standards in many cases. A recent study by the U.S. General Accounting Office concluded: "[A]mong the pesticides studied that EPA has rated as probable carcinogens, the United States has lower MRLs (Maximum Residue Levels) in 55 percent of the cases; the Codex, in only

measures are both inconsistent with the provisions of this decision." (1990 Draft Text, page 165, para. 4.) In the 1990 draft, the underlined text was in parenthesis, signifying that it was contested. In the final SPS text, the underlined clause guaranteeing the maintenance of higher standards is eliminated.

¹¹ Dec. 20, 1991 Final Act, L.46, Annex 1, para. 3.

¹² For animal health the International Office of Epizootics is named as the GATT acceptable international standard. For plant health, the International Plant Protection Convention is named. (Dec. 20, 1991 Final Act, L.46, Annex A, para. 3.)

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27 percent."¹³ For instance, Codex standards allow residues on foods of substances that the U.S. has long banned such as DDT, aldrin and endrin and allows greater concentrations of other extremely dangerous pesticides such as heptachlor and aldicarb than U.S. standards.¹⁴

Codex standards are set by unaccountable, unelected officials. The U.S. is represented at Codex by several U.S. government officials who are accompanied by Codex meetings by an official industry advisory group that includes representatives from the nations largest food and chemical companies. For the first time, two U.S. consumer representatives were allowed to accompany the U.S. Codex delegation to recent meetings. Their report on the proceedings and the influence that the food and chemical industries have over the development of so-called food safety laws at Codex has only fueled growing environmental and consumer groups concern about the Uruguay Round.

D. Nations May Only Apply Sanitary and Phytosanitary Standards That Meet the Requirements of the GATT

The SPS text lays out parties' basic rights and obligations. Parties have the right to have sanitary and phytosanitary standards "provided that such measures are not inconsistent with the provisions of this (SPS) decision."¹⁵

The SPS text requires that "sanitary and phytosanitary measures are applied only to the extent necessary to protect human, animal or plant life or health, are based on scientific principles and are not maintained against available scientific evidence."¹⁶

1. WHAT IS "NECESSARY" Sanitary or phytosanitary measures which conform to international standards are "deemed to be necessary to protect human, animal or plant life or health and presumed to be consistent with... the General Agreement."¹⁷ Thus, national standards which are stronger than international standards, or for which there is no standard are presumed not to be necessary to protect human, animal or plant life. A nation challenged for such a law -- and the U.S. has many standards for which there

¹³ International Food Safety: Comparison of U.S. and Codex Pesticides Standards. Report, U.S. General Accounting Office. August 1991. Page 4.

¹⁴ Id.

¹⁵ Dec. 20, 1991 Final Act, L.36, para. 5.

¹⁶ Dec. 20, 1991 Final Act, L.36, para. 6.

¹⁷ Dec. 20, 1991 Final Act, L.37, para 10.

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are no relevant Codex standards -- must bear the burden of showing its laws is "necessary to protect...", although that clause is not defined in any way except as cited above.

2. ONLY TO THE EXTENT NECESSARY By requiring that sanitary and phytosanitary measures are applied "only to the extent necessary to protect...", the SPS text institutionalizes a requirement that nations defending GATT-challenged laws must show that their law is the least trade restrictive measure possible. A separate SPS provision specifically states that sanitary and phytosanitary rules allowed under the Uruguay Round must be the least restrictive alternative.¹⁸

3. AGAINST AVAILABLE SCIENTIFIC EVIDENCE This clause is not defined or explained in the text. Taken at face value, it seems to require that a stronger standard cannot be maintained if there is conflicting scientific evidence. This concept would be devastating to environmental and health laws, as frequently there is "mixed" science -- scientific evidence supporting more than one conclusion.

The U.S. and the E.C. are currently involved in a dispute over beef hormones which exemplifies this problem. Consumer groups in the E.C. launched a successful campaign to have the sale of beef containing growth hormone residues banned. The ban was based on medical cases in which children who had eaten the hormone-tainted beef began developing opposite gender sexual characteristics (breasts in boys, facial hair in girls.) The ban was supported by consumer groups in many other nations, including the United States. The U.S. government threatened to challenge the E.C. hormone ban at GATT, and had scientific evidence that consumption of the hormone residues was harmless to support that challenge. This case is ongoing and under the rules proposed in the Draft Final Act Text, it seems the E.C. consumer safety law likely would face elimination.

An additional problem is raised by the "available scientific evidence" clause. U.S. consumer and health laws require that before any color, pesticide or other additive can be used on products for sale in the U.S. it must be certified as safe by the government. Japan has similar requirements. Other nations have opposed the American and Japanese "recertification" requirements, arguing that products containing uncertified additives should be allowed entry on an interim basis if an international standards exists for the additive. It appears that the "available scientific evidence clause" could require the U.S.

¹⁸ Dec. 20, 1991 Final Act, L.39, para. 21. ("...when establishing or maintaining sanitary and phytosanitary measures...contracting parties shall ensure that such measures are the least restrictive to trade...")

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and Japan to accept such imports, as they would not be allowed to maintain a no-access rule when the existence of an international standard would present scientific evidence supporting safe acceptance.

E. Nations May Only Maintain Laws Stronger Than International Standards Under Limited Circumstances

The SPS text lays out a set of rules to accomplish its goal of harmonizing sanitary and phytosanitary standards: "To harmonize sanitary and phytosanitary measures on as wide a basis as possible, contracting parties shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this decision."¹⁹

Nations may only introduce or maintain stronger standards if:

- "there is a scientific justification, or

- as a consequence of the level of protection a contracting party determines to be appropriate in accordance with... paragraphs 16 through 23.

Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards... shall not be inconsistent with any other provisions of this decision."²⁰

Most basically, this means that stronger standards can only be maintained if a nation can meet a certain scientific showing or if a nation can show that it has chosen a different level of protection that is supportable under GATT rules on risk assessment as long as neither are inconsistent with the other restrictions of the SPS text.

1. Scientific Justification

"Scientific justification" is not defined or explained in the SPS text. By use of the term "justification," it seems more is required than a simple showing of a scientific basis for regulation. Yet, because all standard-setting is a mix of science and a policy decision about the level of risk society is willing to accept, purely scientific justifications for standards never exist. Because the last clause of this provision limits the two previous clauses by application of all other SPS provisions, the "against available scientific evidence" rule described above would also apply here.

¹⁹ Dec. 20, 1991 Final Act, L.37, para. 9.

²⁰ Dec. 20, 1991 Final Act, L.37, para. 11.

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2. Levels of Protection and Risk Assessment

The second clause of this provisions refers to paragraphs 16 through 23, the SPS section concerning Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection which contains rules on the risk assessment methods that will be deemed GATT-acceptable.

Three GATT SPS risk assessment requirements conflict with the risk assessment procedures that have been the basis of several strong U.S. environmental and consumer standards.

a. Health and Economic Objectives Must Be Balanced

First, the SPS provisions require that nations "shall take into account as relevant economic factors the potential damage in terms of loss of production or sales in the event of .. a pest, the costs of control or eradication.. and the relative cost effectiveness of alternative approaches to limiting risks."²¹

Second, the SPS provisions require nations to take "into account risk assessment techniques developed by the relevant international organization."²² For U.S. consumer and environmental laws, the relevant international organization would be Codex. Codex risk assessment rules require the balancing of health and commercial objectives, as well as less protective rules on calculating exposure to contaminants. Third, the SPS provisions require that nations take into account "the objective of minimizing negative trade effects" in setting health and environmental sanitary and phytosanitary standards.²³

The general requirement of balancing tests in risk assessment would threaten several important U.S. environmental and health laws which do not allow such balancing, and rather are "health based" rules. The "Delaney Clause," which absolutely bans carcinogenic pesticides residues on processed food and carcinogenic additives on any food, is perhaps the best-know example of such a U.S. law. If the SPS provisions were adopted in its current form, zero risk rules such as the Delaney Clause would be exposed to challenge as trade barriers and face elimination.

More specifically, U.S. risk assessment differs in numerous ways from Codex risk assessment which would be the international standard applicable. Just as one example, Codex sets one standard for all possible uses of a pesticide, while the U.S. FDA and EPA

²¹ Dec. 20, 1991 Final Act, L.38, para. 18.

²² Dec. 20, 1991 Final Act, L.38, para. 16.

²³ Dec. 20, 1991 Final Act, L.38, para. 19.

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set tolerances for pesticide residues per each use so as to take into account different concentration effects and other crop specific qualifications.

b. Consistent Levels of Protection Are Required

A final aspect of the SPS risk assessment rules is a requirement of "consistency in the application of the concept of the appropriate level of sanitary and phytosanitary protection..."²⁴ This clause is rumored to have been crafted with the specific intention of eliminating the U.S. Delaney clause, which applies a zero risk from contaminants to processed foods, while other U.S. food standards allow balancing of health and commercial objectives and apply a negligible risk standards.

The SPS provision requires that "each contracting party shall avoid arbitrary or unjustified distinctions in the levels it considers to be appropriate in different situations."²⁵ This requirement also calls into question different levels of risk allowed under U.S. laws for different types of risks – for salmonella increases versus carcinogenic pesticide residues on food. The version of this clause in the final text is one of the most disturbing new elements in the text.

F. Affirmative Preemption Requirement: Nations Must Bring State Law Into GATT Compliance

The Draft Final Act Text requires national governments to take affirmative action to bring the laws of their subfederal governments into GATT compliance.

"Contracting parties are fully responsible under this decision for the observance of all obligations set forth herein. Contracting parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this decision by other than central government bodies."²⁶

This language, in combination with recent GATT jurisprudence on a Canadian challenge of U.S. beer and alcohol taxes, means the federal government would be required to take every action constitutionally available to force state and local compliance with GATT.

Further, the text specifically forbids delegation of authority to states to get ahead of international standards in the future. "In addition, contracting parties shall not take measures which require or encourage local government bodies or non-governmental

²⁴ Dec. 20, 1991 Final Act, L.38, para. 20.

²⁵ Id.

²⁶ Dec. 20, 1991 Final Act, L.43, para. 45.

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bodies within their territories to act in a manner inconsistent with the Provisions of this decision."²⁷

Many federal environmental and health laws either specifically delegate duties to the states, such as the Clean Air Act and the Clean Water Act, or leave the states the right to have higher than federal standards, such as in the area of pesticide regulation. Besides the threat of outright elimination of important state environmental laws such as California's Proposition 65, the chilling effect the SPS preemption rules would have on future progress in environmental and consumer protection can not be overstated, as such state laws have traditionally created an important upwards pull on federal standards.

G. SPS Provisions Are Given Powerful Enforcement

GATT SPS rules get the strongest possible GATT enforcement through application of Article XXII-XXIII dispute resolution rules²⁸. Article XXII and XXIII contain the rules for the settlement of disputes between parties. Article XXII allows for informal settlements using the GATT Secretariat to provide "good offices" -- informal, nonbinding mediation support. Article XXIII allows for a formal GATT dispute resolution panel to be formed. Dispute resolution panels hear arguments and receives papers from the disputing parties and render judgements in written panel rulings. Under current GATT rules, such panel rulings must then be approved by consensus by the GATT Council, a general meeting of the GATT member countries.

However, in section "S" of the Draft Final Act Text, the current rules have been changed dramatically so that unless there is consensus to stop adoption of a GATT panel, it is automatically adopted 60 days after publication. During the 60 days following publication a nation may file an appeal. If an appeal is filed, the case goes to an Appellate Panel for 90 days. The resulting Appellate decision is automatically adopted unless it is unanimously rejected within 30 days of publication.

Thus, under the proposed Uruguay Round SPS rules, a U.S. environmental or health law relating to food could be brought before a GATT panel which has the authority to declare the law in conflict with GATT rules. If the United States could not get all 108 GATT countries to agree to reject the panel decision either during the 60 days following publication of the panel ruling, or during the 30 days following publication of an Appellate ruling, the panel decision would be automatically adopted. The U.S. would then be obliged to change its law or would face automatic trade sanctions such as withdrawal of GATT trade benefits.

²⁷ Id.

²⁸ Dec. 20, 1991 text, L. 41, para. 35.

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II. DETAILED ANALYSIS OF GATT TECHNICAL BARRIERS AGREEMENT(TBT)²⁹

A. Broad Coverage of the Technical Barriers Agreement

Technical standards that are covered by this agreement include all product and process standards for all industrial and agricultural products³⁰, except those agricultural standards covered by the Sanitary and Phytosanitary standards (SPS) agreement³¹.

The Technical Barriers Agreement covers a broad range of product standards and process standards that directly relate to product standards.

There are many factors in analyzing the effect of excluding standards covered in the SPS Agreement from TBT coverage. Both agreements require that rules must be shown to be the least trade restrictive option possible and that only international standards are presumptively GATT consistent. However, the TBT Agreement names a broader list of legitimate objectives for regulation than the SPS Agreement, including environmental protection. The TBT Agreement specifically requires use of international standards except for cases of fundamental technological or climactic incompatibility. While the conditions under which a nation is allowed to choose other than the international standard in the SPS text is very limited, at least on paper it exists.

B. GATT TBT Rules Limit The Right To Have "Technical Standards" International Standards Shall Be Used

The TBT Agreement mandates the use of international standards where technical regulations are required and relevant international standards exist or their completion is imminent unless such standards would be ineffective or inappropriate because of "fundamental climactic or geographical factors..."

The text requires that "[w]here technical regulations are required and relevant international standards exist, or their completion is imminent, Parties shall use

²⁹ Located at sec. "G" of the Final Act.

³⁰ Dec. 20, 1991 Final Act, G.2, Article 1, para. 1.3; G.20, Annex 1, para. 1. (Unlike the 1990 draft text which described coverage as product and process standards in Article 1, the Final Act describes coverage as "industrial and agricultural products in Article 1." However, all of the rules in the Agreement are stated in the context of "technical regulations" which are defined to include products and process requirements in an Annex 1 attached to the TBT Agreement.)

³¹ Dec. 20, 1991 Final Act, G.2, Article 1, para. 1.5.

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them...except when such international standards... would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.³²

This rule seems to assume that technical regulations are technicalities rather than standards, and are often designed to achieve a chosen level of consumer or environmental protection. This rule leaves nation's no right to choose their level of desired protection.

Further, technical standards which are "in accordance with relevant international standards...shall be rebuttably presumed not to create an unnecessary obstacle to international trade."³³

C. Least Restrictive Standards Required

The text also requires that "technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create."³⁴ A footnote follows this clause which states that "[t]his provision is intended to ensure proportionality between regulations and the risks non-fulfillment of legitimate objectives would create."³⁵

First, this TBT standard institutionalizes the necessity for nations defending GATT-challenged laws to show that their law is the least trade restrictive measure possible. This rule was first articulated in several recent GATT panel rulings including the tuna-dolphin case, the Canadian fish case and the Thai cigarette case in which environmental and health measures were declared GATT-illegal. GATT places the burden of proof on defending nations. Thus in each case, the defending nation lost for not satisfactorily proving the negative -- that no less restrictive measure existed.

Second, through the text of the footnote, this provision requires "proportionality" between damage from not having any measure to promote a "legitimate objective" and the damage to trade that would be caused by having such a measure.

Third, the text states that in assessing risks, "relevant elements of consideration

³² Dec. 20, 1991 Final Act, G.3, Article 2, para. 2.4.

³³ Dec. 20, 1991 Final Act, G.3, Article 2, para. 2.5.

³⁴ Dec. 20, 1991 Final Act, G.3, Article 2, para. 2.2.

³⁵ Id.

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are...intended end uses of products.³⁶ Although this is a narrow point, it has already been the center of several debates on pesticide and other chemical regulation, including debate surrounding a proposed "Circle of Poison" law, which would limit export sales of chemicals banned in the U.S. Because many such products are regularly used for unintended purposes, particularly when exported to non-English speaking nations, environmental advocates have argued that the actual known use of the product is a highly relevant consideration in developing health and environmental policy. (For instance, Mexico allows the use of DDT for mosquito control in certain southern regions of Mexico and DDT is allowed into Mexico for such use. However, in practice DDT has a wider use, and DDT residue regularly is found on produce shipped for import to the U.S.)

D. What Is A Legitimate Objective

The text defines legitimate objectives to be "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment."³⁷ It is hopeful that environment is noted as a legitimate objective for a technical regulation. Unfortunately, in a variety of ways, the other rules of this section create a strong presumption against the GATT validity of environmental measures that also impact trade. Thus, without changes to the rest of the text, it would seem that GATT's identification of environmental objectives as "legitimate" basis for maintaining technical regulations is illusory.

E. But What Happens To Existing Technical Standards That Are Different From International Standards Or For Which No International Standards Exists?

What is left unsaid in the TBT text is exactly what happens to existing technical regulations in conflict with existing international standards, or for which there is no international standard. Because it is clear that treatment of existing standards is the key to the stated harmonization goal of the TBT Agreement, it disconcerting that the Agreement's treatment of such standards is not clearly stated.

In the 1990 draft text, a provision in the dispute resolution section required retroactive application of the TBT Agreement's terms to existing standards. "To the extent that a Party consider that technical regulations... which exist at the time of entry into force of this Agreement are not consistent with the provisions of this Agreement, such regulations... shall be subject to the provisions of Article 13 and 14 of this

³⁶ Dec. 20, 1991 Final Act, G.3, Article 2, para. 2.2.

³⁷ Dec. 20, 1991 Final Act, G.3, Article 2, para. 2.2. (The Preamble at G.1 names the same list of objectives, stating that no nation should be prevented from taking measures to ensure such objectives.)

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Agreement."³⁸ (Article 13 sets up a standing Committee on Technical Barriers to Trade and Article 14 is Dispute Resolution.)

The lack of clarity is especially troubling because it appears that an important portion of the TBT Agreement is not included in this publicly distributed text. Under the heading of "Final Provisions" on page G.19 is a blank page. In the 1990 draft text, a blank page with a parenthetical "To be addressed subsequently" appears under this heading. Because the Dec. 20, 1991 Draft Final Act Text is the final text, it seems odd that neither the "Final Provisions" nor another parenthetical appear.

F. Effect, Not Intent, Counts

The TBT text requires parties to ensure that technical regulations are not "prepared, adopted or applied with a view to or the effect of creating unnecessary obstacles to international trade."³⁹ Thus, as with the MMPA, even if the intent of the law is to achieve a legitimate environmental goal, if its effect is to limit trade, it is in conflict with the GATT unless otherwise excepted.

G. Affirmative Preemption Requirement: Nations Must Bring State Law Into GATT Compliance

As with SPS standards, the Draft Final Act Text's TBT standards also require national governments to take affirmative action to bring the laws of their subfederal governments into GATT compliance with the TBT rules. "Parties are fully responsible under this Agreement for the observance of all provisions of Article 2 (the rules limiting technical standards described above). Parties shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies."⁴⁰

H. TBT Code Is Giver New Powerful Enforcement

The Draft Final Act Text gives to the TBT rules the strongest possible GATT enforcement through application of GATT Article XXII-XXIII dispute resolution.⁴¹ The 1990 draft GATT did not give the TBT Agreement such strong enforcement. Challenges under the TBT rules would be subject to the automatic panel adoption process described above in the SPS section.

³⁸ 1990 Draft text, Page 63, Article 14.5 "Retroactivity."

³⁹ Dec. 20, 1991 Final Act, G.2, Article 2, para. 2.2.

⁴⁰ Dec. 20, 1991 Final Act, G.5, Article 3, para. 3.5.

⁴¹ Dec. 20, 1991 Final Act, G.18, Article 14, para. 1.

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I. All GATT Nations Get Notice And Comment Rights On New Technical Regulations Of Any GATT Nation

The TBT text mandates that whenever a nation proposes a technical regulation that is different than the international standard, or for which a relevant international standard does not exist and "the technical regulation may have a significant effect on trade" of other nations, the regulating nation shall⁴²

- notify the GATT Secretariat of the proposed regulation and its objective⁴³, and
- "without discrimination, allow reasonable time for other Parties to make comments in writing, discuss these comments upon request"⁴⁴, and
- "take these written comment and the results of these discussions into account."⁴⁵

There is a clause that allows for omission of certain of the specific steps required in the above process in times of emergency, although a nation must eventually meet the requirements listed above.⁴⁶ However, this notice and comment requirement must also be followed by state and local governments.⁴⁷

III. DETAILED ANALYSIS OF THE AGREEMENT ESTABLISHED A MULTILATERAL TRADING ORGANIZATION**A. Establishing a New Global Commerce Agency On The Fast Track**

The Agreement Establishing the Multilateral Trade Organization (MTO) is a remarkable document in several ways. First, despite what will certainly be great controversy over the mere concept of establishing such a world commerce agency with legal personality like the United Nations, a standing dispute resolution body and power

⁴² Dec. 20, 1991 Final Act,, G.4, Article 2, para. 29.

⁴³ Dec. 20, 1991 Final Act, G.4, Article 2, para. 9.2.

⁴⁴ Dec. 20, 1991 Final Act, G.4, Article 2, para. 9.4.

⁴⁵ Dec. 20, 1991 Final Act, G.4, Article 2, para. 9.4.

⁴⁶ Dec. 20, 1991 Final Act, G.4, Article 2, para. 10.

⁴⁷December 20, 1991 Final Act, G.5, Article 3, para. 3.1.

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to order cross-sectoral retaliation for trade violations, the document additionally requires MTO Members to "take all necessary steps, where changes to domestic laws will be required to implement the provisions...to ensure conformity of their law with these Agreements."⁴⁸

Second, the Agreement creating an MTO is tucked at the end of over 500 pages of Uruguay Round Draft Final Act Text in an Annex. Because it is attached to the Uruguay Round Agreement, this monumental decision would be presented to Congress under the extraordinary "fast track" procedural rule. The decision to establish an MTO, much less the adoption of this MTO proposal, certainly requires extensive study and debate. For instance, an MTO created through more open and democratic processes very likely would have rules that balance commercial interests against other equally legitimate interests such as the environment, health and the values of democratic rule-making and government accountability.

B. The MTO States Noble Goals Of Full Employment, Sustainable Development And Raised Standards Of Living, But Consists Of the GATT Rules Which Have Not Promoted Such Goals

In its preamble, the text recognizes that "relations in the field of trade and economic endeavor should be conducted with a view to raising standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the optimal use of resources of the world as sustainable levels, and expanding the production and trade in goods and services."⁴⁹

While these stated goals are shared by most, it is at best highly questionable that these goals will be achieved by the MTO because it adopts as its rules GATT as updated through the Uruguay Round and Tokyo Round Agreements, as well as the new General Agreement on Trade in Services and the Agreement in Trade Related Aspects of Intellectual Property Rights.

Particularly the clause concerning the sustainable use of the world's resources rings hollow. As perhaps best documented in the June 1991 World Wildlife Fund study, "The GATT, Environmental Protection and Sustainable Development", current GATT rules and the proposed Uruguay Round GATT rules promote the opposite behavior.⁵⁰

⁴⁸ Dec. 20, 1991 Final Act, page 92, MTO Article XVI, para. 4.

⁴⁹ Dec. 20, 1991 Final Act, page 91, MTO preamble.

⁵⁰ Arden-Clarke, Charles, "The GATT, Environmental Protection and Sustainable Development," A World Wildlife Discussion paper, June 1991.

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C. The MTO Adopts GATT, GATS And Trips As Its Rules

The MTO's rules are laid out in four Annexes to the MTO Agreement. By agreeing to the MTO, nations become parties to the Agreements to which the Annex refers.⁵¹ If a nation withdraws from the MTO, it is also removed from all of the annexed agreements.⁵²

Nations must accept the following rules without any reservations⁵³:

- The General Agreement on Tariffs and Trade (GATT) as it results from the Uruguay Round Draft Final Act Text, and its associated legal instruments, except the Protocol of Provisional Application,

- the Tokyo Round Agreements and Arrangement as they result from the Draft Final Act Text of the Uruguay Round, and its associated legal documents except the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Arrangement and the Arrangement regarding Bovine Meat

- the General Agreement on Trade in Services (GATS)

- the Agreement in Trade Related Aspects of Intellectual Property Rights.

- the Integrated Dispute Settlement Understanding contained in the main body text of the Draft Final Act Text at section T.

- the Trade Policy Review Mechanism decided on April 12, 1989.

Nations are not automatically made party to the following Agreements, but are encouraged to join:

- the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Arrangement and the Arrangement regarding Bovine Meat

D. The MTO Would Unite Trade In Goods And Services Under A Single Cross

⁵¹ Dec. 20, 1991 Final Act, page 92, MTO Article 2, para.1.

⁵² Dec. 20, 1991 Final Act, page 98, MTO Article XV, para. 1.

⁵³ Dec. 20, 1991 Final Act, page 98, GATT Article XVI para. 2.

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Retaliatory Dispute Resolution Mechanism

GATT rules allow for continuing Rounds of negotiations to develop principles existing in the core GATT. However, changes to the core Articles of GATT, for instance extending GATT to include trade in services, would require amendment to the core GATT Articles, a procedure which requires agreement by most nations which are party to GATT.

Many developing country members of GATT are concerned about the effect on their nation sovereignty of the inclusion of services, intellectual property and investment policy in global trade disciplines. Developing nations feel they must protect domestic infant communications, financial, and technology industries to create nation infrastructure and increase self sufficiency, and thus self determination. Particularly, such nations oppose the power cross retaliation would give multinational corporations - for instance penalizing a developing country's natural resources exports (trade in goods) as a punishment for not allowing sufficient market access for telecommunication or financial industries (trade in services). Thus, developing countries did not support amending GATT to include such issues as services and investment.

The MTO proposal avoids amending the GATT, and removes the possibility that developing countries could block such amendment. Rather, by annexing trade in goods and services plus investment and intellectual property under one dispute resolution system, the MTO allows cross sectoral retaliation without amendment. Developing countries must either agree to the new MTO which includes services, intellectual property and investment rules or be excluded from the agreement on trade in goods.

E. Structure Of The MTO

The MTO proposal sets up regular biannual Ministerial meetings of all parties.⁵⁴ It sets up a "General Council," the successor organization to the GATT Council, open to all parties which is to meet regularly.⁵⁵ The General Council is to establish a Dispute Settlement Body, a Trade Policy Review Mechanisms and assorted "subsidiary bodies" including a committee on Trade and Development.⁵⁶ Additionally, Councils on Goods, Services and TRIPS are to be established and meet at least eight times per year.⁵⁷

The MTO proposal sets up a Secretariat with staff to be appointed by the General

⁵⁴ Dec. 20, 1991 Final Act, page 93, MTO Article V, para. 1.

⁵⁵ Dec. 20, 1991 Final Act, page 93, MTO Article V, para. 2.

⁵⁶ Dec. 20, 1991 Final Act, page 93, MTO Article V, para. 3.

⁵⁷ Dec. 20, 1991 Final Act, page 93, MTO Article V, para. 4.

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Council. The General Council is to appoint a Director-General and define that person's role, duties and responsibilities. After the MTO were to enter into force and until the General Council could choose a Director-General the GATT Director-General and the GATT Secretariat staff "shall become" the Director General and Secretariat of GATT. That would make current GATT Director-General Arthur Dunkel, author of this Draft Final Act Text, the temporary head of the new MTO.

F. MTO Dispute Resolution Increases Power, But Is Not Clearly Described In Draft Final Act Text

The MTO's dispute resolution rules would include the automatic adoption of GATT dispute panel decisions set out in section "S", yet special MTO dispute resolution rules are also set out in the Integrated Dispute Settlement Understanding (IDSU), which is located at section "T" in the actual Uruguay Round Draft Final Act Text, and not in the Annex in which the rest of the MTO text is located.

The MTO makes clear that the Integrated Dispute Resolution rules will be used for MTO dispute settlement, however many aspects of section "T" Integrated Dispute Resolution are unclear and seem incomplete. For instance, the Annexes to section "T" that are referenced within its text (listing to what terms the Integrated dispute resolution applies are not included in the text.) The IDSU text gives duties to an "Appellate Body" and a "arbitrator" but does not create or describe either in the text. The IDSU generally does not contain the level of operational detail, for instance size of dispute resolution panels or time lines, seen in the GATT dispute resolution text at section "S."

The IDSU does establish a standing "Dispute Settlement Body to exercise the authority of the General Council" and the Councils and Committees of the covered Agreements... It shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations...⁵⁸ It will also be the body that authorizes the suspension of concessions or other obligations if a party does not follow its recommended rulings.⁵⁹

Membership in this standing Dispute Settlement Body is open to any member of the MTO and all Dispute Settlement Body decisions are to be taken by consensus.⁶⁰ It is not clear if this Dispute Settlement Body is merely a new name attached to the same duties and powers of the GATT Council (all GATT nations meeting together), or if membership will entail greater duties and thus effectively be limited to nations with

⁵⁸ Dec. 20, 1991 Final Act, T.1, para. 2.

⁵⁹ Dec. 20, 1991 Final Act, T.4, para. "2bis".

⁶⁰ Dec. 20, 1991 Final Act, T.1, para. 4.

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resources to participate. Further, the extent of the its authority is unclear. Besides its general description and duties, the only other reference to the Body is when a dispute panel "cannot resolve fundamental conflict between the substantive provisions of any covered agreements without creating new rights or obligations under those agreements, it shall report its conclusion to the Dispute Settlement Body for appropriate action."⁶¹ As with much of this section, what that means is also unclear.

As under GATT Article XXIII dispute resolution, nations can petition for the formation of dispute resolution panels, although the size of such panels is not stated. Panels shall be composed of "well-qualified governmental and/or nongovernmental individuals, including persons who have served on or presented a case to a GATT panel, served as a representative to the GATT or in the GATT Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a member."⁶²

G. Cross Retaliatory Dispute Resolution Under The MTO

Under the title "Integrated Dispute Settlement System" are a series of specific provisions allowing cross retaliation between different sectors and between different Agreements. ⁶³ Nations are instructed that they should first seek to suspend concessions or other obligations in the same sector, but that they have the right, if "the circumstances are serious enough"⁶⁴ to seek suspension of concessions under different agreements. Cross retaliation is the core purpose for creating the MTO.

H. Cooperation with the IMF and the World Bank Mandated, Cooperation with Non-Governmental Organizations Allowed.

The text requires the MTO to cooperate with the IMF and the World Bank. ("With a view to achieving greater coherence in global economic policy-making, the MTO shall cooperate, as appropriate, with the International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), and affiliated agencies."⁶⁵) The text requires the MTO to make suitable arrangement with

⁶¹ Dec. 20, 1991 Final Act, T.4, para 1.

⁶² Dec. 20, 1991 Final Text, T.2, para. 2.

⁶³ Dec. 20, 1991 Final Act, T.5, para. 1.

⁶⁴ Dec. 20, 1991 Final Act, T.5, para. 1(c).

⁶⁵ Dec. 20, 1991 Final Act, page. 93, MTO Article III, para. 6.

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intergovernmental bodies and agencies.⁶⁶ The text allows the MTO, as its discretion, to arrangement for "consultation and cooperation with non-governmental organizations concerned with matters within the scope of the MTO."⁶⁷

IV. DETAILED ANALYSIS OF GATT DISPUTE RESOLUTION ESTABLISHED IN THE URUGUAY ROUND

A. General Background on GATT Dispute Resolution

GATT Articles XXII and XXIII contain the rules for the settlement of disputes between parties. Article XXII allows for informal settlements using the GATT Secretariat to provide good offices. Article XXIII provides for a formal GATT dispute resolution panel to be formed. The panel hears arguments and receives papers from the disputing parties and renders a judgement in a written panel ruling. Under current rules, the panel ruling must then be approved by consensus by the GATT Council, a meeting of most GATT member countries.

B. Automatic Adoption of Panel Reports Expands GATT's Power Over Nations

In the Draft Final Act Text, dispute resolution rules have been changed dramatically so that unless there is consensus to stop adoption of a GATT panel it is automatically adopted 60 days after publication.⁶⁸ For environmental and consumer issues, such a change means strong enforcement of destructive GATT rules.

Perhaps to provide a counter argument to the massive expansion of GATT power automatic adoption of panel reports accomplishes, the Draft Final Act Text creates an appeals process. The Draft Final Act Text creates a standing Appellate Body.⁶⁹ The Body consists of a pool of seven members, three of whom serve at any time on an appeals panel. The members are appointed by contracting parties to serve four year terms.

Under the new rules, an appeal can be filed within 60 days following publication of a panel ruling. If an appeal is filed, an Appellate panel's considerations "cannot

⁶⁶ Dec. 20, 1991 Final Act, page 92, MTO Article IV, para. 1.

⁶⁷ Dec. 20, 1991 Final Act, page 92, MTO Article IV, para. 2.

⁶⁸ Dec. 20, 1991 Final Act, S.12, Article 14, para. 4.

⁶⁹ Dec. 20, 1991 Final Act, S.13, para. 15.1.

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exceed 90 days from notification of intent to appeal to appellate decision."⁷⁰

The Appellate decision which results is automatically adopted unless it is unanimously rejected within 30 days of publication. "An appellate report shall be adopted by the Council and unconditionally accepted by the parties to the dispute unless the Council decides by consensus not to adopt the appellate report within thirty days following its issuance..."⁷¹

Creation of an appellate process (that itself involves automatic adoption of panel rulings) does nothing to balance the massive expansion of GATT power vis-a-vis the national governments of the contracting parties accomplished by automatic adoption of panel decision. In addition, by taking away the possibility for nations to block consensus and stop panel decisions, the Draft Final Act Text makes absolute the lack of accountability over U.S. government officials at GATT. As is apparent with the tuna dolphin case, under the current dispute resolution rules the Administration is susceptible to pressure from Congress and the public to keep GATT from eliminating certain types of U.S. laws. Under the new rules, pressure will be shifted to Congress to change the U.S. laws GATT has automatically decreed GATT-illegal.

Thus, under the new GATT dispute resolution rules a U.S. environmental or health law could be brought before a GATT panel. That GATT panel could declare the law to be an unnecessary obstacle to trade. If the U.S. could not get all 108 GATT countries to agree to reject the panel decision either during the 60 days following publication of the panel ruling or during the 30 days following publication of an Appellate ruling, the panel decision would be automatically adopted. The U.S. would then be obliged to change its law or would face sanctions such as withdrawal of GATT trade benefits.

C. Burden of Proof: "Guilty Unless Presumed or Proved "Innocent"

The Draft Final Act Text does not require a showing of actual injury to begin a dispute resolution action. Rather, one party must show a breach of the rules, and then the challenged party must carry the burden of showing there is no damage.

"In cases where there is an infringement of the obligation assumed under the General Agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other contracting parties, and in such cases, it is up to the contracting party against whom the complaint has been brought to rebut

⁷⁰ Dec. 20, 1991 Final Act, S.13, para. 15.5.

⁷¹ Dec. 20, 1991 Final Act, S.14, para. 14.14.

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the charge."⁷²

This is the philosophy that underlies the SPS and TBT Agreements. The basic rule of the SPS and TBT provisions are that national standards which comply with international standards are presumed to meet GATT requirements. Such a presumption is very important in GATT because it will determine which party must carry the burden of proof if a standard is challenged as an unfair trade barrier.

In simple terms, the GATT rule is guilty unless presumed or proved innocent. For instance, if a U.S. law that is stronger than the international standard is challenged, then the U.S. must prove that the law is not an unfair trade barrier under GATT rules. Under this principle, the status quo or default position is that any law higher than an international standard is an unfair barrier to trade.

D. Secrecy Pervades GATT Dispute Resolution

Absolute secrecy of panel arguments and papers is maintained in the Draft Final Act Text.

"Written memoranda submitted to the panel shall be considered confidential, but shall be made available to the parties to the dispute."⁷³ "Panel deliberation shall be secret."⁷⁴

Under these rules, non-governmental groups who have ensured a domestic law's existence and enforcement cannot read the case's documents, become involved as an amicus on the case, much less observe the oral arguments. This is especially problematic if the challenged law is one that the Administration has not supported. This was the case with the tuna-dolphin case. The very embargo provisions being challenged at GATT had only been enforced by the Administration after an environmental group won a court order forcing the Administration to enforce the law. Several European press reports suggested that the U.S. government did not strongly defend the Marine Mammal Protection Act before the GATT panel.⁷⁵

E. A Losing Party Must Change Its Laws or Face Sanctions

⁷² Dec. 20, 1991 Final Act, S.3., para. 1.8.

⁷³ Dec. 20, 1991 Final Act, S.11, para. 12.1.

⁷⁴ Dec. 20, 1991 Final Act, S.11, para. 12.2.

⁷⁵ The Economist, "Divine Porpoise," Oct. 5, 1991, page 31; and The Guardian, "Global Conservation Threatened as GATT Declares War," Sept. 6, 1991.

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Panels are instructed to recommend that parties whose laws do not conform with GATT bring such measures into compliance. First and foremost, a losing party is charged with withdrawal of the measures found to be inconsistent with the GATT.

"Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendation and rulings under Article XXIII:2 are not implemented within a reasonable amount of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the General Agreement..."⁷⁶

If a party refuses to comply with a panel ruling by eliminating its law, after a reasonable amount of time the GATT Council can decide to allow the winning party to withdraw trade concessions from the losing party.

"The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-a-vis the other contracting party, subject to authorization by the Contracting parties of such measures."⁷⁷

Bush Administration officials argued that the U.S. could maintain laws against which GATT has ruled, and simply pay compensation to the winning party. This argument has been adopted by supporters of the Uruguay Round Draft Final ACT in Congress. Such an arrangement is hardly an alternative to changing the GATT rules and dispute resolution process so that environmental and consumer laws will not get labelled as illegal trade barriers. However, the Draft Final Act Text makes clear that even that alternative is only considered appropriate as an interim measure until a law is withdrawn. "The provision of compensation should be resorted to only if the immediate withdrawal of the measures which are inconsistent with the GATT is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the GATT."⁷⁸

F. Dispute Resolution Also Applies to State and Local Laws

All aspects of GATT dispute resolution from the panel system to the threat of countervailing sanction apply to state and local governments under the Draft Final Act Text.

⁷⁶ Dec. 20, 1991 Final Act, S. 16, para 20.1.

⁷⁷ Dec. 20, 1991 Final Act, S.3, para. 1.7.

⁷⁸ Dec. 20, 1991 Final Act, S.3, para.1.7.

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"The dispute settlement provisions of the General Agreement may be invoked in respect of measures affecting its observances taken by regional or local governments or authorities within the territories of a contracting party. When the contracting parties have ruled that a provisions of the General Agreement has not been observed, the responsible contracting party shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance..."⁷⁹

G. Limiting Unilateral Trade Policy Decisions

Under a section entitled "Strengthening of Multilateral System", GATT nations are restricted from taking unilateral trade enforcement actions. It appears that this section would create an independent ground — in addition to the tuna-dolphin panel ruling — to challenge American use of trade policy to enforce environmental, human rights, or labor rights laws.

⁷⁹ Dec. 20, 1991 Final Act, S.18, para. 20.7.



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DETAILED ANALYSIS OF NAFTA SANITARY AND PHYTOSANITARY PROVISIONS, TECHNICAL STANDARDS PROVISIONS, AND DISPUTE RESOLUTION

I. NAFTA STANDARDS CHAPTERS: SANITARY AND PHYTOSANITARY AND TECHNICAL STANDARDS

The NAFTA contains two sections on standards. Sanitary and Phytosanitary (SPS) rules pertain to food and foodstuffs. Technical Standards (TBT) cover all remaining manufacturing and agricultural standards. The Sanitary and Phytosanitary Standards text and the Technical Standards section can be thought of as rules for taking exceptions to the NAFTA's primary goal of removing obstacles to trade. In these two sections, the NAFTA lays out requirements that restrict measures taken by NAFTA countries which might have the effect of limiting trade. These measures must meet this restriction or be considered illegal trade barriers.

The standards provisions of the NAFTA are slightly improved over those rejected in the GATT Uruguay Round text by nearly every U.S. environmental and consumer group. However, the SPS text in particular exposes numerous U.S. national and state laws to challenge. It could stop progress in environmental protection in the area of pesticides and consumer health and safety in food labelling, inspection and other contaminant standards such as additives and preservatives. The TBT text's detrimental impact is on the process by which U.S. standards are now set. For instance, by requiring NAFTA countries to accept the conformity assessment procedures and bodies of other countries, the TBT text would undermine the role citizens and consumer and environmental advocates now have on standard-setting. As written, neither the SPS nor TBT text are acceptable from a consumer or environmental protection viewpoint.

A. SANITARY AND PHYTOSANITARY PROVISIONS

The Sanitary and Phytosanitary Measures section of NAFTA's agriculture chapter establishes criteria for food safety standards, including pesticide residue limits, nutritional labelling requirements, food and color additive regulations, and food inspection.¹ The NAFTA provisions are an improvement over the Uruguay Round provisions, in that the NAFTA imposes the burden of proof on a party challenging a

¹Sub ch. B, Ch. 7.

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food safety measure, rather than on the country defending the measure.² Although other aspects of NAFTA's food safety subchapter moderate the harshness of the Uruguay Round provisions, NAFTA is still likely to jeopardize many important food safety measures.

1. **Adverse Effects of Harmonization
to International Food Safety Standards.**

Both the Uruguay Round and NAFTA address the extent to which a country may maintain standards that are more protective of public health than international ones. Like the Uruguay Round, the NAFTA presumes that standards of certain specified international organizations, such as the Codex Alimentarius Commission, comport with the food safety requirements of the Agreement, and it requires the three countries to base their food safety standards on relevant international ones.³

a. **CODEX**

The Codex Alimentarius Commission is a body of the World Health Organization and the U.N. Food and Agriculture Organization, which establishes voluntary international food safety standards. It is made up of government officials, who are generally not health experts, and who participate with the active assistance of industry advisors from such companies as Hershey Foods, Nestle U.S.A., Kraft General Foods, Coca Cola Company, and Pepsi Company, and trade groups, such as Grocery Manufacturers of America and the National Food Processors Association.⁴

Codex has published voluntary standards for the hygienic and nutritional quality of food, food additives, pesticide residues, contaminants, labeling, and methods of analysis and sampling, many of which are much weaker than public health standards in the United States. For example, some Codex standards allow residues of pesticides that have been banned in the United States, such as DDT on meat, grains and dairy. Others allow higher residues of pesticides on foods than existing EPA and FDA regulations. Thus, Codex standards allow higher residues on some foods of such pesticides as DDT, heptachlor, aldrin, diazinon, lindane, permethrin, and benomyl.⁵ In

²Article 765(6).

³Article 713(1) & (2).

⁴See Ritchie, "GATT, Agriculture and the Environment: The Double Zero Plan," 20 The Ecologist 214, 217 (Nov./Dec. 1990); 56 Fed. Reg. 29,050-51 (June 25, 1991).

⁵Ritchie, supra, at 21.

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some cases, Codex standards allow residue levels that are 5-times higher than U.S. standards.⁶ In addition, some Codex standards allow pesticide residues that have been banned in certain states.⁷

Harmonization of U.S. food safety standards to Codex ones could have significant detrimental effects on food safety. NAFTA creates strong pressure for countries to adhere to Codex standards, although it permits more stringent domestic standards if such standards comply with NAFTA's other food safety requirements.⁸

b. Use of International Standards During U.S. Approval Process

As a related matter, NAFTA requires Parties to consider using international standards on an interim basis while they are deciding whether to approve use of a food additive or contaminant.⁹ While this provision may not mandate the use of the international standard, at a minimum, it may give rise to reasonable expectations that such standards will be used, in which case it could support a nullification and impairment challenge. The use of international standards on an interim basis raises health issues because international standards are often based on less stringent requirements than U.S. standards. This situation arose in 1990 when the FDA discovered residues of the pesticide procymidone on wine imported from Europe. Because the pesticide is not used in the United States, no tolerances existed for it. The manufacturer petitioned EPA to establish a tolerance on an expedited basis and urged EPA to use a residue limit that had been proposed by the Codex Committee on Pesticide Residues, but that had not been finally adopted.¹⁰ Scientific studies suggested that procymidone is a carcinogen and reproductive toxin, but the data was inadequate to permit the full analysis normally required for establishment of a tolerance. Ultimately, EPA established an interim tolerance based on the available, though limited, evidence.¹¹ This type of

⁶Id.; see also GAO, International Food Safety: Comparison of U.S. & Codex Pesticide Standards 4 (Aug. 1991).

⁷See, e.g., Md. Agric. Code Ann. § 5-210.5 (1989) (heptachlor); Minn. Stat. § 18B.115 (1990) (same).

⁸Article 713(3).

⁹Article 717(4).

¹⁰55 Fed. Reg. 39,171-77 (Sept. 25, 1990).

¹¹56 Fed. Reg. 19,518 (April 26, 1991).

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action will expose consumers to potential public health risks before EPA obtains complete data and conducts its full analysis of the public health and environmental effects of the action.

c. Harmonization and Trade Challenges of Food Safety Laws

The likelihood of trade disputes arising with respect to pesticide standards is not remote since the standards in the three countries differ greatly. Thus, Canada had health-based pesticide standards prior to the United States-Canada Free Trade Agreement, and under those standards it banned pesticides like Alachlor that may still be used in the United States. The U.S.-Canada Free Trade Agreement directive to work toward equivalent pesticide standards may lead to a weakening of Canadian standards and increased residues of harmful chemicals on foods exported to the United States.¹²

While the NAFTA states that the Parties shall pursue equivalence "[w]ithout reducing the level of protection," given the other limitations in the section on both the level of protection and the means of achieving that level of protection,¹³ the pursuit of equivalent standards could lead to weaker food safety standards. More specifically, NAFTA's equivalence provisions require the countries to accept food imports that are shown to achieve its level of protection. If the level of protection is defined loosely or is a minimum that is generally exceeded in practice, allowing such imports might expose the American public to greater health risks. For example, imports with some harmful residues might be permitted in the face of a U.S. pesticide ban, or higher residues might be allowed.

With regard to Mexico, the General Accounting Office has reported that nearly 20% of pesticides whose registrations have been canceled or suspended by EPA or voluntarily canceled by the registrant in the United States may lawfully be used in Mexico.¹⁴ In addition, numerous active pesticide ingredients used in Mexico have no EPA tolerances.¹⁵ GAO has found that "[t]here are a significant number of pesticides

¹²Affidavit of Steven Shrybman ¶ 15 (Aug. 31, 1991), in Public Citizen v. Office of the U.S. Trade Representative, No. 91-1916 (D.D.C.).

¹³See *infra* at pp. 15,2.

¹⁴GAO, Food Safety & Quality: Five Countries' Efforts to Meet U.S. Requirements on Imported Produce 25-29 (1990).

¹⁵*Id.* at 81-84.

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with Mexican tolerances for food commodities that do not have U.S. tolerances."¹⁶ Some of the pesticides identified by GAO as having some U.S. tolerances, but not for all the uses of the pesticide permitted in Mexico, have been the subject of EPA special reviews because of their potential adverse health effects,¹⁷ (aldicarb, captan, carbofuran, diazinon, dicofol, dimethoate, oxydemeton-methyl, PCNB), and others are suspected carcinogens, reproductive toxins, and/or mutagens,¹⁸ (chlorothalonil, fenvalerate, malathion, methomyl, permethrin).¹⁹ GAO has suggested that it would be relatively easy for the United States to establish additional tolerances for pesticides that already have tolerances, but the net effect of establishing such additional tolerances would be to increase public exposure to the pesticide, which could have detrimental health effects. While the United States and Mexico have been working to address some of the problems with different pesticide standards in the two countries, those efforts have focused on situations where there is a Mexican but no United States' tolerance either for the pesticide or for particular commodities.²⁰ These efforts are not addressing pesticides that have tolerances in both countries for the same commodities but at different levels, nor are they addressing tolerance differences that may develop in the future, which is likely to occur since the United States is going through an extensive process of determining whether pesticides that have been on the market for a long time meet the current, more stringent scientific requirements for registration.²¹ Additional changes in U.S. tolerances through the harmonization process might result in more exposure to such chemicals.

2. Limitations on a Country's Ability to Choose Its Level of Public Health Protection.

NAFTA allows each country to "establish its appropriate level of protection" in

¹⁶GAO, Pesticides: Comparison of U.S. & Mexican Pesticide Standards & Enforcement 30 (June 1992).

¹⁷See, e.g., *id.* at 46-4.

¹⁸see, e.g., *id.*

¹⁹See NRDC, Pesticide Alert 18-19 (1987).

²⁰GAO, supra, at 3.

²¹*Id.*

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accordance with other requirements of the Agreement.²² While this is often offered as a safeguard for U.S. standards, NAFTA's other requirements may severely limit the United States' ability to invoke this "level of protection" safeguard.

a. Only One "Level" of Protection Allowed, Inconsistence Challengeable

It appears that a country must establish one level of protection for all its food safety standards. The food safety provisions speak in terms of a single level of protection,²³ and state that each country "shall, with the objective of achieving consistency in such levels, avoid arbitrary and unjustifiable distinctions in the levels in different circumstances, where such distinctions result in arbitrary and unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties."²⁴ This caveat may impose a sharp limitation on the ability of a country to establish higher levels of protection in some circumstances as opposed to others. NAFTA also admonishes the parties to consider the objective of minimizing negative trade effects in establishing its appropriate level of protection.²⁵ While this is an admonition and not an absolute mandate, it may give support to a challenge that a level of protection is a disguised restriction to trade,²⁶ or that it impairs another country's reasonably expected benefits under the NAFTA.²⁷

The United States may be vulnerable to a challenge that it maintains impermissible distinctions in the level of protection afforded by its various pesticide standards. Indeed, EPA regulates pesticides under three different statutory standards.

In order for a pesticide to be lawfully marketed and used in the United States, it must have an EPA registration for the particular use. Federal Insecticide Fungicide &

²²Article 712(2).

²³See Articles 712(2), 713(1), 715(2), (5).

²⁴Article 715(3)(b).

²⁵Article 715(3)(a).

²⁶Article 712(6).

²⁷Article 2004 & Annex 2004 (allowing trade challenges for nullification or impairment of reasonably expected benefits, which does not require an actual breach of a legal obligation); J. Jackson, Restructuring the GATT System at 62-63 (1990).

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Rodenticide Act ("FIFRA").²⁸ The statutory standard for registering pesticides is whether use of the pesticide will cause "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."²⁹ In other words, EPA balances the benefits of the pesticide use against its potential risks to human health and the environment.

Food tolerances prescribe the amount of a pesticide residue that may lawfully be on a particular food.³⁰ Food containing residues in excess of the tolerance amounts or for which there is no tolerance may be seized and may give rise to criminal penalties.³¹ The Food, Drug and Cosmetic Act directs EPA to establish food tolerances for pesticide chemicals on raw agricultural commodities "to the extent necessary to protect the public health," and to give appropriate considerations to such other relevant factors as "the necessity for the production of an adequate, wholesome, and economical food supply."³² Thus, EPA balances the benefits of using the pesticide to produce a crop against the potential human health effects of any residue that will result.

The standards for pesticide residues in processed foods vary depending on whether the pesticide concentrates during processing. Where no concentration occurs, the raw commodity tolerance applies to the residue in the processed food, and the same risk-benefit standard applies. However, the statute does not allow EPA to consider the benefits of a pesticide's use in setting tolerances for pesticide residues that concentrate during processing. Instead, no tolerance "shall issue if a fair evaluation of the data before the [Administrator of EPA] fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe."³³ Moreover, in a provision known as the Delaney Clause after its author, the statute provides that no additive shall be deemed safe if it is found to induce cancer in animals or humans.³⁴ This same health-based standard (and the zero-risk Delaney Clause standard for carcinogens) applies to food additives, such as artificial sweeteners,

²⁸7 U.S.C. § 136j(a)(1)(A), (G).

²⁹FIFRA, 7 U.S.C. § 136(bb); see id. §§ 136(j), 136a(5)(C) & (D).

³⁰Food, Drug & Cosmetic Act, 21 U.S.C. §§ 346a, 348.

³¹21 U.S.C. §§ 331-334, 402(a)(2)(B) & (C).

³²Id. § 346a(b).

³³21 U.S.C. § 348(c)(3)(A); see id. §§ 321(s) & 342(a)(2)(C).

³⁴21 U.S.C. § 348(c)(3)(A).

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preservatives, chemical processing aids, animal drug residues, and packaging materials. In addition, the Food, Drug and Cosmetic Act contains a similar Delaney Clause prohibition on carcinogenic color additives.³⁵

EPA's application of these standards has led to approval of pesticides for various uses that present different levels of health and environmental risk. For carcinogenic pesticides that concentrate in processed food, the Food, Drug and Cosmetic Act mandates a zero-risk standard. Under the risk-benefit standards for pesticide registration and food tolerances on raw commodities, EPA generally approves pesticide uses that present less than a 1 in 1 million risk of cancer, generally disapproves pesticide uses that pose a risk greater than 1 in 10,000, and varies its decisions for intermediate risks depending on the benefits of the pesticide use.³⁶

As this discussion shows, the United States does not maintain a consistent level of protection in its pesticide regulations, let alone in all of its food safety regulations. In the Food, Drug and Cosmetic Act, Congress prescribed different levels of protection for different circumstances three decades ago based on its policy determination that carcinogens should not be introduced into certain foods. The Reagan and Bush Administrations did not support the zero-risk standard for carcinogenic food additives and pesticides in processed foods because, they contended, it leads to irrational results.³⁷ Instead, they endorsed a 1 in 1 million risk standard for cancer risks. *Id.* In practice, however, even this level of protection has not been afforded uniformly in EPA's pesticide tolerances.³⁸ For these reasons, the United States would be vulnerable to a claim that it maintains arbitrary or unjustifiable distinctions in the levels of public health protection provided in different food safety standards.

Even if a country's level of protection passes muster, it may establish or maintain a food safety standard that promotes a higher level of protection only if that standard complies with all of NAFTA's other food safety requirements. These are addressed

³⁵21 U.S.C. § 376(b)(2)(B).

³⁶National Research Council, Regulating Pesticides in Food: The Delaney Paradox 34 (1987).

³⁷See Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (color additives); Les v. Reilly, 968 F.2d 985 (9th Cir. 1992), cert. pending, National Agricultural Chemicals Association v. Les, No. 92-800 (pesticide residues in processed foods).

³⁸See National Research Council, Regulating Pesticides in Food: The Delaney Paradox 34 (1987).

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below.

3. NAFTA's Scientific Basis and Risk Assessment Requirements Would Further Constrain Food Safety Measures.

NAFTA limits food safety standards further in Article 712(3), even where an appropriate level of protection is achieved by the measure. Thus,

Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

- (a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;
- (b) not maintained where there is no longer a scientific basis for it; and
- (c) based on a risk assessment, as appropriate to the circumstances.

a. Standards Based on Consumer Demand, Exposed to Challenge

These requirements prohibit countries from imposing food safety standards in response to consumer demand, unless that consumer demand can be backed up by scientific principles. A recent trade dispute illustrates the effect that this limitation may have. The European Community ("EC") adopted a ban on the importation of hormone-treated beef. The ban resulted from complaints from Italian mothers that their infants grew breasts and began to menstruate when they ate beef treated with di-ethyl stilbenes or DES. The EC took the position that the ban was justified both because there is no scientific evidence that beef treated with growth hormone is safe and therefore it should have the right to adopt a precautionary ban to protect consumers. The United States challenged these arguments and contended that consumer preferences and inconclusive scientific evidence cannot sustain trade restrictions.³⁹ The United States brought the

³⁹The United States-European Community Hormone Treated Beef Conflict, 30 Harv. Int'l L.J. 549 (1989); The U.S.-EC Hormone Beef Controversy & the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade, 14 N.C.J. Int'l L. & Comm. Reg. 135 (1989); Office of Technology Assessment, Trade and Environment: Conflicts and Opportunities 86-87 (May 1992).

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matter to the Codex Alimentarius Commission. However, in July 1991, the Codex Alimentarius Commission voted not to adopt a committee report supporting the United States' position that hormones are safe for use in food production.⁴⁰ If the United States could prove that the hormone-treated beef ban is not based on scientific principles, then NAFTA would preclude its imposition, even though it responded to consumer demands.

b. Standards Based on Policy Determinations Exposed to Challenge

NAFTA may also lead to challenges to food safety standards that are not based on risk assessment, but rather on policy determinations.⁴¹ Given that the zero-risk Delaney Clause standards are based on policy, rather than scientific, judgments, they may not satisfy the NAFTA requirement that the measure must be based on scientific principles.⁴² After all, the Delaney Clauses constitute a political determination made by Congress about whether carcinogens should be introduced into our nation's food supply. Moreover, given the current debate over whether these zero-risk standards are warranted under the current state of scientific knowledge, they might be challenged on the ground that "there is no longer a scientific basis for [them]."⁴³ In addition, the Delaney Clause's zero-risk standards are not based on a risk assessment.⁴⁴ Instead, Congress established a zero-risk level for certain uses of carcinogens in foods. Once the agency determines that a substance is a carcinogen, then the statute prohibits those uses of it, regardless of the precise risk of cancer presented by the substance.

c. U.S. Must Use International Risk Assessment Techniques

Even for those standards that are based on risk assessment, such as those for pesticide residues on raw commodities, NAFTA requires that the parties use risk

⁴⁰Nutrition Week (July 12, 1991).

⁴¹See Art. 712(3)(c).

⁴²Article 712(3)(a).

⁴³Article 712(3)(b) & page 7-45 (defining "scientific basis" as "a reason based on data or information derived using scientific methods"); see, e.g., Merrill, FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?, 5 Yale J. on Reg. 1 (1987).

⁴⁴Article 712(3)(c).

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assessment techniques developed by international or North American standardizing organizations.⁴⁵ It is not clear whether such risk assessment techniques have already been developed, and if so, the extent to which they differ from those used by United States agencies. It should be noted that EPA prides itself on using conservative risk assessment techniques in order to be protective of public health.⁴⁶ If these conservative risk assessment techniques are at odds with the accepted international ones, a vast range of U.S. pesticide standards may be in jeopardy.

d. NAFTA May Inhibit Negotiated Pesticide Registrant Settlements

The possibility of a NAFTA challenge might also inhibit negotiated settlements of administrative actions brought by EPA against pesticide registrants, which limit harmful pesticide residues sooner than might otherwise occur. EPA often agrees to such arrangements, even where they allow use of the pesticide in greater quantities or for a longer period of time than the agency might prefer, in order to avoid protracted, complex, and often hotly contested regulatory proceedings. In such situations, EPA may not have made a final determination based on the scientific evidence. However, in the event of a trade challenge, EPA may be forced to go through comparable proceedings in which its assessments of the scientific evidence and its judgments would likely be accorded less deference than it is given in its administrative proceedings under FIFRA and in which it would not have procedural advantages, such as the ability to require the registrant to produce extensive data, like it has in FIFRA administrative proceedings. Moreover, the least trade-restrictive alternative and other NAFTA requirements would be added to its statutory requirements.

4. NAFTA Significantly Restricts the Means That May be Used to Promote Food Safety.

In what may prove to have devastating and far-reaching effects, NAFTA permits trade challenges to the methodology used in food safety measures to deal with legitimate problems. Under NAFTA, food safety standards may be applied "only to the extent necessary to achieve its appropriate level of protection, taking into account technical and

⁴⁵Article 715(1)(a).

⁴⁶Victor Kimm, EPA Deputy Administrator for Toxic Substances, 254 Science 1276 (Nov. 29, 1991).

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economic feasibility."⁴⁷ The term "necessary" also appears in the GATT exceptions, and has been construed in that context to require a regulating country to use the means that are the least restrictive to trade. In the most authoritative construction of "necessary," a GATT panel stated in a report that was adopted by the Contracting Parties:

a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails that least degree of inconsistency with other GATT provisions.⁴⁸

Indeed, the Uruguay Round food safety section explicitly requires countries to use the least trade-restrictive alternative in its food safety measures.⁴⁹ Given that the terms used in the NAFTA are identical to GATT language that has given rise to this test, and the absence of any expressed intention to forbid this construction, it is likely that food safety standards will be subjected to this least trade-restrictive alternative requirement. Further support for this requirement is found in the requirement that a food safety standard may not "arbitrarily or unjustifiably discriminate" between like goods.⁵⁰ This language tracks the language in GATT Article XX, which has been construed to require that the natural resources exception in Article XX(g) must, in order to be "justifiable" be "primarily aimed" at conservation of exhaustible natural resources. This requirement has, in turn, been applied to enable GATT dispute panels to scrutinize the means

⁴⁷Article 712(5); see also Article 712(1) (Parties may "adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory

⁴⁸United States -- Section 337 of the Tariff Act of 1930, Report of GATT Panel, adopted Nov. 7, 1989, BISD 936th Supp., at 345, 392-93; see also Thailand -- Restrictions on Importation of and Internal Taxes on Cigarettes, Report of GATT Panel, adopted on Nov. 7, 1990, BISD (37th Supp. 1990), at 200 (applying same definition of "necessary" under Article XX(b), the health exception).

⁴⁹1991 Uruguay Round Draft, ¶ 6, at L-36, ¶ 21, at L-39.

⁵⁰Article 712(4).

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employed to accomplish conservation goals.⁵¹

a. Least Trade Restrictive Test Undermines Safety

This requirement may jeopardize many food safety standards. For example, other countries might lodge challenges under NAFTA to pesticide bans, such those on DDT, heptachlor, and Alar, on the ground that limiting the quantities of the pesticide used or the residues permitted on foods for consumption would be less restrictive ways to protect public health. Alternatively, it could be argued that disclosure requirements would be less-trade restrictive than outright bans, and that they would provide adequate protection. While United States courts give deference to the regulatory means chosen by federal agencies to address legitimate health problems, GATT panels do not when they apply the least restrictive alternative test, and there is no reason to assume that NAFTA panels will adopt a more deferential standard. As such, the least restrictive alternative requirement could jeopardize many food safety measures.

One measure that may be jeopardized by the least trade-restrictive test is the United States' mandatory nutritional labeling requirements, which go further than the Codex guidelines on voluntary nutritional labeling.⁵² It could be argued that voluntary labeling programs are less restrictive to trade while achieving the legitimate public health objective. In our view, mandatory labeling programs are demonstrably more effective than voluntary ones and therefore should not be exposed to a challenge as a trade barrier. However, NAFTA would expose the nutritional labeling standards to such a challenge with unpredictable results.

Another measure that could be challenged under the least restrictive alternative test is the Infant Formula Amendments Act of 1986⁵³. This Act amends the Infant Formula Act to require batch-by-batch testing of infant formula, instead of the periodic testing that had previously been required, and to require testing for all 29 nutrients required by the Act, whereas six had previously been exempted from the testing requirement. Before this amendment, the Food and Drug Administration had imposed

⁵¹See, e.g., Report of the GATT Panel, United States -- Restrictions on Imports of Tuna at 47 (issued Sept. 3, 1991); Report of the GATT Panel, Canada -- Measures Affecting Exports of Unprocessed Herring and Salmon, BISD 35th S.F.P., at 98, 114 (adopted Mar. 22, 1988).

⁵²See 56 Fed. Reg. 60,366 (Nov. 27, 1991); Crane, Behlen, Yetley & Vanderveen, "Nutrition Labeling of Foods: A Global Perspective," Nutrition Today (July/Aug. 1990).

⁵³Pub. L. No. 99-570, Title IV, § 4014, 100 Stat. 3207-116-20 (codified at 21 U.S.C. § 350a).

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less stringent requirements under the looser statutory mandates, and these had been upheld in FORMULA v. Heckler⁵⁴. This Act may be open to challenge on the ground that other available means of ensuring adequate nutrient content of infant formula, i.e., the ones that had been judicially sanctioned, are less restrictive to trade.

The least trade-restrictive test might also affect the viability of the proposed Circle of Poison Prevention Act, which would ban the export of pesticides that are not registered by the EPA for domestic use, that do not have a food tolerance, or that contain an active ingredient for which EPA registrations have been canceled.⁵⁵ Since the Codex Alimentarius Commission permits the use of many pesticides that are banned in the United States,⁵⁶ the Circle of Poison Prevention Act's prohibitions on the export of such pesticides would not be presumed to be NAFTA-consistent, but would be subject to the NAFTA's requirements for food safety standards. A challenger might contend (and a NAFTA panel might conclude) that a viable less trade-restrictive alternative would be to permit the export of the pesticides and apply nondiscriminatory food tolerances on residues of such pesticides permitted in foods in the United States. Another less restrictive alternative might be reliance on the Food and Agriculture Organization's voluntary prior informed consent system, which would be viewed to be less arbitrary since it has been endorsed by other countries in addition to the United States.

**b. U.S. May Not Limit Goods Because of Unsafe
or Environmentally Damaging Production Processes**

Aside from the least restrictive alternative test, NAFTA also restricts the means used to promote food safety by perpetuating a trade distinction between product and process standards. Thus, Article 712(4) of NAFTA's food safety provisions allows nondiscriminatory product restrictions, but not restrictions based on the process of producing the food.

This distinction arose in a recent GATT dispute between Mexico and the United States over United States' restrictions on the import of tuna caught by fishing methods that endangered dolphins. The restrictions ran afoul of GATT, in large part because they were based not on differences in the tuna itself, but rather on the process by which the

⁵⁴779 F.2d 743 (D.C. Cir. 1985).

⁵⁵S. 898 & H.R. 2083, 102d Cong., 1st Sess. (Apr. 23, 1991).

⁵⁶See supra ¶ 25; GAO, supra, at 4.

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tuna was caught.⁵⁷ NAFTA continues this distinction between nondiscriminatory product restrictions, which are permissible if they comport with other requirements, and process restrictions, which are impermissible in the context of food safety measures. Accordingly, there might be challenges to restrictions imposed on food that has been subject to food irradiation processes or that is the result of biotechnology since both may arguably be characterized as process rather than product restrictions. Moreover, Mexico might challenge a U.S. law that bans imports of shrimp caught with technology that adversely affects endangered species of sea turtles, which has already been the source of some controversy between the two countries.⁵⁸

NAFTA opens the door to trade challenges to the means chosen to promote food safety. This scrutiny is troubling because it will come from a trade perspective that is suspicious of health and environmental measures that restrict trade. It is also troubling because food safety regulation is an art as much as it is a science. The challenge facing domestic regulators is to devise the most effective means to address new food safety problems that are only beginning to be understood. Those means are often developed by testing innovative solutions and finding the most ideal remedy for the problem. If some of those solutions are foreclosed by NAFTA and other trade agreements, it is the American public that will suffer.

5. NAFTA Prohibits Extraterritorial Food Safety Measures.

NAFTA prohibits food safety standards that protect life or health outside the territory of the regulating country.⁵⁹ This was an issue in the tuna-dolphin dispute, in which the GATT panel construed the GATT health exception to apply only to life and health within the regulating country. Together, the product/process distinction and the restriction on extra-territorial regulation limit the ability of the countries to impose food safety measures, like the tuna embargo, the shrimp restrictions discussed above, and the United States' ban on fish imports from countries using large-scale drift nets,⁶⁰ which was passed last session, because these laws apply to processes, not products, and are not intended to protect the health of United States' residents. Similarly, the Circle of Poison

⁵⁷See United States -- Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991).

⁵⁸Departments of Commerce, Justice & State, the Judiciary & Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609(b), 103 Stat. 1037-38 (1989) (codified at 16 U.S.C. § 1537 note); OTA, supra, at 125.

⁵⁹Article 712(1).

⁶⁰H.R. 215.

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Prevention Act could not be justified as necessary to protect the health of United States residents consuming the imported foods where the pesticide is unlikely to be reimported into the United States as a food residue, although there might be health effects in the United States from production and transportation of the pesticides. In this day of growing international interdependence, particularly in conserving natural resources, it is short-sighted to prohibit domestic measures that protect health or resources abroad.

6. NAFTA May Weaken United States' Food Inspection.

NAFTA imposes limitations on the inspection procedures used by the parties. First, Article 717(1)(a) requires that inspection procedures be initiated and completed in no less favorable manner for goods of one party than for goods of the inspecting country or others. This requirement may require changes in inspections of Mexican produce. Since 1979, FDA has had a special program to sample and analyze Mexican produce for pesticide residues.⁶¹ This program began because of increasing volumes of imported Mexican produce. Further increases are anticipated under NAFTA. However, it could be argued that this special program provides less favorable treatment to Mexican goods than those of other countries. Less stringent inspection procedures for Mexican produce would likely have an adverse public health effect, given that Mexico has a higher violation rate of U.S. food safety standards than the violation rate for domestic produce.⁶²

NAFTA's inspection provisions also specify that the information required to be submitted as a part of inspection procedures must be limited to that "necessary" for conducting the procedure,⁶³ that requirements regarding individual sampling must be limited to that which is "reasonable and necessary,"⁶⁴ and that criteria for selecting location of inspection facilities and of samples should not cause unnecessary inconvenience.⁶⁵ Given the meaning of the term "necessary" in the trade context, these requirements may inject a least trade-restrictive standard into inspection procedures.

In recent years, the United States Department of Agriculture has sought to move

⁶¹GAO, U.S.-Mexican Pesticide Comparisons, at 33.

⁶²*Id.* at 34-36.

⁶³Article 717(1)(d).

⁶⁴*Id.* 717(1)(f).

⁶⁵*Id.* 717(1)(h) & (j).

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towards a system of industry self-inspection, rather than governmental inspections.⁶⁶ Moreover, there have been allegations that the United States-Canada Free Trade Agreement has resulted in a weakening of United States inspection systems along the United States-Canadian border to the detriment of public health.⁶⁷ It could be argued in a trade challenge that industry inspections or less stringent governmental inspection requirements would be less trade-restrictive means of conducting inspections under NAFTA. Any weakening of U.S. border inspections would increase the risk of food contamination, which, as the recent Jack-in-the-Box food poisonings confirm, can have devastating, even tragic, consequences.

7. NAFTA Will Lead to the Invalidity of State Food Safety Measures.

Under principles of federalism, it is traditionally the province of the states to regulate health and safety matters. Where the federal government enters a regulatory field to deal with a national problem, it often preempts some state authority in the area. However, in many health and environmental areas, federal law permits, and welcomes, state supplementation of the federal protections. In this way, states (and local governments) identify health and environmental problems and test solutions on a smaller scale than a national scheme.

Federal pesticide regulation fits this model. States retain authority to regulate pesticide use, provided that they do not permit uses that have been banned by the federal government. In other words, they may supplement federal regulation to provide greater public health protection, but they may not undermine the protections provided by the federal government.

NAFTA threatens to upset that balance. NAFTA's food safety standards are subject to Article 105, which provides that "[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." This is the same language that is used in the United States-Canada Free Trade Agreement, which prevails over conflicting state laws, as well as over conflicting applications of state laws.⁶⁸ Moreover, that Agreement's implementing legislation authorizes the United States to bring an action challenging a state law or

⁶⁶See Institute of Medicine, Committee on Evaluation of USDA Streamlined Inspection System for Cattle, Cattle Inspection (1990).

⁶⁷Affidavit of William Lehman (Apr. 16, 1992).

⁶⁸See Article 103, US-CFTA; Pub. L. No. 100-449, § 102(b)(1)(A) & (B), 102 Stat. 1851 (1988).

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application thereof on the ground that it is inconsistent with the Agreement.⁶⁹

a. NAFTA Tougher on States Than GATT

It should be noted that NAFTA has greater state law effect language than the GATT, which requires the contracting parties "to take such reasonable measures as may be available to it to ensure observance" of the GATT by state and local governments.⁷⁰ A recent GATT dispute settlement panel construed that language to find that the GATT was "part of the federal law in the United States and as such [] superior to GATT-inconsistent state law."⁷¹ Moreover, the panel concluded that the United States had not demonstrated that "the general obligation of contracting parties to withdraw measures inconsistent with the General Agreement cannot be observed in this case by the United States as a result of its federal constitutional structure . . ."⁷² In other words, the GATT panel construed the GATT state law effect provision to require the United States to take all actions within its constitutional authority to ensure that state laws comply with GATT.

b. State Laws At Risk

Under the more stringent NAFTA state law effect provision, NAFTA's food safety provisions threaten a whole array of state laws. For example, although states may, as a matter of federal law, establish food tolerances that limit pesticide residues in foods to a greater extent than the federal tolerance, the state tolerances may be viewed as unnecessary, since the federal standard is a less-trade restrictive alternative. They also may be considered a violation of NAFTA because they are in furtherance of a different level of protection than that chosen by the federal government.

In other circumstances, the state law effect provision might require a federal agency to issue a regulation preempting state authority to issue requirements in violation of NAFTA. For example, for years, industry has been urging the Food and Drug Administration to issue a regulation preempting states from imposing warning requirements on foods, as well as drugs and cosmetics. These efforts have been aimed at California's Proposition 65, an initiative adopted in 1986 by a nearly two to one

⁶⁹*Id.* § 102(b)(3).

⁷⁰*See* GATT, Article XXIV.

⁷¹GATT Panel Report, United States – Measures Affecting Alcohol & Malt Beverages at 85 (Feb. 7, 1992).

⁷²*Id.* at 97.

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majority of California voters, which prohibits "knowingly and intentionally" exposing anyone to chemicals that are listed by the State of California as causing cancer or reproductive toxic effects, without providing a clear and reasonable warning.⁷³ A limited exception is provided if the one responsible for the exposure can demonstrate that it results in "no significant risk" of cancer and the equivalent for reproductive toxins. Faced with the prospect of providing such warnings, some companies have withdrawn products from the California market, such as canned fruit products contaminated with lead from lead soldered cans and food products containing certain listed carcinogens.⁷⁴ This law is also cited as the precipitating factor for fetal alcohol syndrome labels on alcoholic beverages, which, in turn, spurred the federal government to establish such labeling requirements.⁷⁵

Unlike international standards, such as those of Codex, or federal pesticide law, Proposition 65 places the burden of proof on industry to demonstrate the safety of known carcinogens or reproductive toxins in their products, such as pesticides in the food supply. This aspect could be challenged under NAFTA on least trade-restrictive alternative grounds. Proposition 65 also establishes a higher level of protection than federal law for reproductive toxins, mandating a warning for exposures occurring at 1/1000th of the level found to result in "no observable effect" in laboratory animals. This could be challenged under NAFTA as an inconsistent level of protection that is arbitrary and unjustifiable. In addition, Proposition 65 warnings are required irrespective of the route of exposure to the toxic substance involved, which might be challenged as not being based on scientific principles. While we believe Proposition 65 is well-grounded in scientific principles, a NAFTA panel might disagree. Given that Proposition 65 is not the result of a scientific analysis, but rather is a popular referendum, it may be vulnerable to challenges of each aspect of it under NAFTA criteria.

Another example is provided by the moratorium on the use of certain hormones in the production of milk in Wisconsin and Minnesota. This moratorium may be challenged because it is directed at the process of producing the milk rather than milk as a product. It could also be argued that there are less restrictive alternatives, namely regulating the residues of the hormones in milk products, rather than banning their use.

In sum, the American public benefits from strong federal, state and local United

⁷³Safe Drinking Water & Toxic Enforcement Act, Cal. Health & Safety Code, §§ 25249.5 *et seq.*

⁷⁴See Declaration of Steven A. Book ¶¶ 9, 11-12, 14-15 (April 10, 1992), in *Public Citizen v. Department of Health & Human Services*, No. 92-0326-TFH (D.D.C.).

⁷⁵Id. ¶ 10.

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States' food safety standards. If those standards are successfully challenged by Canada or Mexico under NAFTA, then they will, in the face of trade sanctions, likely be weakened at least as to imports, which will expose the public to increased risks from food. Even in the absence of an actual trade challenge, United States' food safety standards may be weakened in anticipation of such challenges or in response to threatened challenges. Indeed, there are many instances in recent years in which federal agencies have taken Codex standards into account in their regulatory actions, presumably in anticipation of the prominent role given to Codex in trade agreements then under negotiation.⁷⁶ Moreover, if a food safety standard is no longer applied to imports, there will then be pressure on federal regulators and/or Congress to weaken the measures for domestic produce as well in order to remove the competitive advantage that would accrue to imports after a successful trade challenge. As NAFTA's effects trickle down to the grocery store shelves, it is the American public that will suffer.

B. NAFTA TECHNICAL STANDARDS PROVISIONS

The coverage of the NAFTA Technical Standards rules is quite broad, applying to any standards-related measures of a Party not covered in the SPS text that directly or indirectly affect trade in goods or services. Unfortunately, the NAFTA TBT text does not provide any exception for standards based on production or process methods that limit trade, except those directly related to a product's physical characteristics. Thus, except for specific exceptions for labelling and packaging standards, under NAFTA rules countries cannot regulate based solely on the process of production or harvesting of a product, which as described in the SPS section is a serious problem.

The NAFTA TBT text contains both some improvements on the existing GATT and proposed Uruguay Round TBT texts and also in the area of standard-setting procedures some additional problems. However, the existing GATT TBT text is given precedent over the NAFTA TBT text in the case of conflict.⁷⁷ Thus, areas of greater trade liberalization, such as the NAFTA standard-setting procedures, could be permissible. Areas of greater restriction, such as the NAFTA recognition of environment or consumer safety as a basis for a technical regulation, could be in conflict with the

⁷⁶See, e.g., 55 Fed. Reg. 41,856 (Oct. 16, 1990) (incorporating Codex standard for quick frozen blocks of fish fillets); 55 Fed. Reg. 23,565 (June 11, 1990) (incorporating Codex standard for quick frozen fish sticks); 56 Fed. Reg. 8084 (Feb. 26, 1991) (taking Codex standard into account in establishing nutritional labeling requirements); 55 Fed. Reg. 39,171 (Sept. 25, 1990) (considering adoption of Codex standard as an interim measure until EPA had enough data to establish a tolerance under U.S. law).

⁷⁷ NAFTA Article 903.

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Uruguay Round TBT text. This clause largely undermines the real progress made in other sections of this text, as it provides for the worst of both worlds.

The NAFTA TBT text would allow maintenance of a wider range of standards-related measures than the NAFTA SPS text. TBT does not require science or risk assessment in the setting of levels of protection. TBT considers a wider range of objectives for regulation to be legitimate (including consumer issues relating to quality and sustainable development.) TBT also allows for different levels of protection across different regulatory circumstances. Further, unlike the SPS text, the TBT text defines what is an unnecessary obstacle to trade and does so in a fashion that would be less likely to ensnare legitimate regulatory measures. Like the SPS text, the TBT text confirms that in the case of a dispute resolution challenge under this text, the burden to show a violation of the NAFTA would fall on the challenging Party. Finally, the TBT text generally places slightly less responsibility on the federal government than the rest of the NAFTA to see that state and local governments comply.

Despite TBT's many superiorities to the NAFTA SPS text, the TBT text still requires that countries use international standards or international standards whose completion is imminent except where such standards would be ineffective or inappropriate. The TBT text presumes only such standards not to be inconsistent with the TBT text. However, it limits this requirement by allowing an international standard's failure to meet a country's chosen level of protection to be a legitimate excuse, which the GATT does not. For international standards, the TBT text lists Codex, as well as several standard-setting bodies not listed in the SPS text such as the World Health Organization and the Food and Agriculture Administration of the United Nations.

The clauses on the use of international standards highlight the main goal of the TBT text, which is harmonization of standards. As compared to the harmonization clauses of the NAFTA SPS text and both the SPS and the TBT texts of the GATT, the NAFTA TBT text seems least likely to promote downward harmonization of standards. Rather, the harmonization clauses of the TBT text focus strongly on processes to facilitate harmonization. Thus, Parties are required:

- "to the greatest extent practicable, [to] make compatible their respective standards-related measures so as to facilitate trade in a good or service..."
- to "accredit, approve, license and otherwise recognize conformity of assessment bodies in the territory of another Party on terms no less favorable than those accorded to such bodies in its territories" with a four year phase-in period before this clause pertains to Mexico;

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- "recognizing the existence of substantial differences in the structure, organization and operation of conformity assessment procedures in their respective territories, make compatible to the greatest extent practicable such procedures."
- "upon the request of another Party, to promote compatibility of a specific standard or conformity assessment procedure..."
- to "accept the results of a conformity assessment procedure conducted in the territory of another Party, provided that it is satisfied that such procedure offers an assurance..." and
- to treat the standard of another country as equivalent to domestic standards if the exporting Party can show its technical regulation adequately fulfills the importing Party's NAFTA-legitimate objectives.

The impact of these procedural harmonization clauses of the NAFTA TBT text on current U.S. standards-setting procedures is very worrisome. For instance, the notion of accepting another country's conformity assessment that a U.S. standard and that of another NAFTA country are equivalent rather than following some publicly-accessible U.S. notice and comment procedure under the Administrative Procedure Act means consumer and environmental advocates are cut out of the standard-setting process. Similarly, accrediting the assessment bodies of other countries as equivalent to parallel domestic agencies eliminates the role of citizen and Congressional oversight of the functioning of such bodies.

Throughout the TBT text, disturbing procedural issues are raised. For instance, the TBT text establishes the same rights of notice and comment for other NAFTA Parties as the SPS text. Thus, the issue of the appropriateness of requiring special consideration of Mexican and Canadian government comments on U.S. rule-making is raised here as well. Further, the text establishes another new organization, the Committee on Standards-Related Measures, comprised of representatives from each government. The Committee's main duty is to facilitate harmonization.

To accomplish harmonization goals, the Committee is required to set up four subcommittees. The timeliness and mandates of two of those groups are charged with specific workplans contrary to environmental and consumer protection.

The Subcommittee on Land Transportation Standards is mandated to implement the following work plan for making standards compatible for motor carriers, although Mexican trucks have been granted immediately effective additional rights for access to the U.S. in anticipation of the NAFTA:

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- one and one half years for non-medical driver standards such as language use and age;
- two and one half years for medical-related standards for drivers;
- three years for standards on emissions and environmental pollution, inspection, maintenance and repair, brakes, securement of cargo, weights and dimensions; and
- three years for standards on motor carriers' safety compliance.

Thus, despite immediate access for Mexican trucks to U.S. roads, consistent environmental and safety rules will only apply after years. For railroads, there is a six year phase-in for compatibility of rules on transportation of dangerous goods.

Another subcommittee on Automotive Standards is mandated to make compatible standards concerning automotive goods based on impact on industry integration, extent of barrier to trade, level of trade affected and the extent of such disparity. The subcommittee is allowed, but not required, to consider other closely related measures such as emissions. Auto safety is not included. Finally, for Automotive standards, a special stronger rule for state compliance is established. The special rule replicates the GATT language interpreted in the alcoholic beverages case described above in which the federal government was required to take all measures within its constitutional powers to force state compliance. This clause seems aimed at states such as California which have led the country in auto standards. Because California is such a large car market and production must be geared to meet California's requirements, California's requirements have had the effect of raising the standards of cars sold in other states.

Additionally, the text suggests the Committee set up working groups on a variety of issue important to consumer and environmental protection.⁷⁸ Again, this section raises worrisome procedural issues. While the TBT text allows that such working groups should attempt to include state level representatives, it does not provide a role for consumer or environmental advocates. Thus, decision-making on issues currently accessible to citizens and their representatives through the Administrative Procedure Act and the legislative process would be moved to working groups of government officials whose primary mandate is harmonization for trade expansion.

⁷⁸ Areas include: packaging, labelling and presentation of consumer information; criteria for assessment of potential environmental hazards for goods; guidelines for testing chemicals; methods by which consumer protection, including matters relating to consumer redress, can be facilitated; and more.

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II. NAFTA DISPUTE RESOLUTION

Under NAFTA dispute resolution:

- one country can challenge existing and proposed environmental or consumer laws of another country as noncompliant with NAFTA rules, and
- under a clause on "non-violation impairments," can bring cases against measures that do not violate the NAFTA rules, but that cause another NAFTA country to miss an economic opportunity it "could reasonably have expected to accrue to it⁷⁹."

This latter provision is outrageous, allowing another NAFTA country to bring a U.S. federal or state environmental or consumer law into dispute resolution merely on the basis that it has impaired an economic expectation of the other country. This provision greatly undermines the meaningfulness of the specific rules of the NAFTA. It puts the United States in the position of having its trading partners interfering with environmental and social choices that could impact their trade, but meet the NAFTA requirements.

If a law is found either to violate the NAFTA's rules or to cause impairment of an economic benefit, NAFTA dispute resolution requires that the law be removed or not implemented. Failing such a resolution, one NAFTA country can pay the challenging country compensation for the economic loss caused by maintenance of a successfully-challenged law. The possibility of paying to maintain environmental and consumer laws is used by the Bush Administration as support for the position that the United States can maintain any law it chooses. However, considering current budgetary constraints and political pressures for deregulation of environmental and consumer standards, it seems that the pressure to eliminate or lower such a ransomed standard would be immense.

⁷⁹ NAFTA 9/6/92, 20-19, Annex 2004-1. "If any Party considers that any benefit it could reasonably have expected to accrue to it... is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement..."

While the specific rules of the NAFTA SPS and TBT text expose legitimate U.S. consumer and environmental laws to being ruled trade barriers, the U.S. could be forced to pay "damages" even if a U.S. standard meets the NAFTA tests. In a section called "Nullification and Impairments", the NAFTA allows countries to bring cases in both the SPS and TBT areas for national measures that do not violate the NAFTA rules, but that cause another NAFTA country to miss an economic opportunity it could "reasonably" have expected to accrue to it. This provision for "non-violation impairments" is extremely troublesome, as it would put into place the same pressures to lower and cap standards even for standards that pass the NAFTA tests.

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NAFTA dispute resolution maintains the tight secrecy that plagued the NAFTA negotiations. In fact, the NAFTA secrecy language is stronger than that of GATT, requiring strict confidentiality on all documents submitted in dispute resolution, actual dispute proceedings, and panel reports until absolutely finalized. Opening up trade policy to the sunshine of public participation was a major goal of environmental and consumer activists. This is particularly important because the NAFTA gives to the Executive branch the sole role of protector of challenged environmental and consumer laws.

While absolute secrecy is mandatory, the much-touted allowance of scientific review boards for environmental, health safety or other scientific matters is only allowed at the consent of the disputing parties. If the Parties agree to allow such input, the NAFTA text requires the panel to take it into account. However, the scientific boards, when allowed, are limited to questions of fact. Thus, under NAFTA dispute resolution, five-person panels of trade officials meeting in tight secrecy will be empowered to second guess the non-factual aspects of environmental and consumer laws such as ~~at~~ priorities set by national and state democratic political bodies.

The Bush Administration has made an important, though narrow, improvement in the NAFTA dispute resolution in comparison to that of GATT.

For two narrow categories of cases:

- those arising under the Sanitary and Phytosanitary or Technical Standards texts concerning factual issues concerning environmental, health, safety or conservation, including directly related scientific matters,
- those concerning conflicts with three named environmental treaties (Convention on Trade in Endangered Species, the Montreal Protocol, and the Basel Convention)

a defending Party can insist that a case that could rise under GATT or NAFTA be taken to NAFTA. It seems this provision would not apply to many environmental and consumer health and safety issues because they do not arise under the SPS or TBT chapters. Additionally, if a challenge of an environmental law does not raise factual issues, it seems that the defending Party would not have the NAFTA option and could be forced into GATT dispute resolution, where the defending Party bears the burden of proof in all cases.

Finally, the NAFTA creates a new North American organization, the Free Trade Commission. The Commission has broad powers to interpret and apply the NAFTA. The Commission is empowered to establish Model Rules of Procedure for NAFTA dispute

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resolution. The only procedural rules the Commission is required to include are for secrecy and the right to a hearing and the submission of written documents to dispute panels. Yet, it seems that other rules are contemplated though not set out in the text. For instance, reference is made to "scientific bodies set out in the Model Rules..." yet no such bodies are described. Why a complete reporting of planned procedural rules wouldn't be part of the NAFTA text is disconcerting.

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THE IMPACT OF THE NORTH AMERICAN FREE TRADE AGREEMENT ON THE ENVIRONMENT

Testimony of
 GREENPEACE

before the
 SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
 COMMITTEE ON MERCHANT MARINE AND FISHERIES
 UNITED STATES HOUSE OF REPRESENTATIVES

by
 Barbara Dudley
 Executive Director of Greenpeace US

March 10, 1993

R E C Y C L E D P A P E R

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Executive Summary

The North American Free Trade Agreement (NAFTA) is a fundamentally anti-environment agreement, particularly in its treatment of environmental standards, energy resources, conservation issues, and agriculture. Next week, trade ministers from Canada, Mexico and the U.S. will begin negotiating "supplemental agreements" to the NAFTA and the establishment of a trinational environmental protection commission. Greenpeace and other environmental organizations have expressed serious reservations about the viability of this approach for addressing the adverse consequences that would result from the Bush NAFTA.

Greenpeace repeats the call for a thorough assessment of the environmental implications of the NAFTA. The environmental movement has been united in demanding an assessment, and we urge the Administration to recognize the need to understand the conflicts between trade and environment policies before trying to craft solutions to these problems.

The NAFTA, and its predecessor the Canada-U.S. Free Trade Agreement, tends to brand environmental regulations as non-tariff barriers to trade. Under the FTA, for example, government and industry have challenged requirements to reduce the emissions of polluting smelters and have gutted provincial government reforestation programs. The NAFTA provides no means of trade-linked enforcement of environmental, labor, health or safety standards. The agreement also exacerbates global warming, undermines strategies to achieve energy conservation, and threatens the survival of family farmers, farmworkers, and their rural communities.

The only way in which domestic environmental legislation can be made immune from challenge under the rules of trade, as proposed by the NAFTA, is to make them explicitly exempt from the application of the trade remedies. Conversely, the only viable mechanism to ensure compliance by other countries with international norms is the use of economic sanctions. It is the trade sanctions authorized by a small number of international environmental agreements, such as the Montreal Protocol, that gives them strength and influence. Given these facts, in order for an environmental protocol to address the deficient provisions of the current NAFTA, such a protocol must:

- a) be comprehensive, and address all of the adverse environmental consequences of unregulated trade;
- b) be endorsed by all NAFTA parties;
- c) be supported by the same trade/economic sanctions that give international trade agreements force and effect;
- d) be made explicitly paramount to the NAFTA in the even of conflict; and,
- e) must be supported by compensatory finance to make it workable in all NAFTA countries, so that these measures do not penalize poorer countries.

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INTRODUCTION

Chairman Studds, members of the Environment and Natural Resources Subcommittee. I am Barbara Dudley, U.S. executive director of Greenpeace, an international environmental organization working for a safe and nuclear-free world, clean air and water, the protection of terrestrial and marine wildlife and their habitats, and the development of an environmentally responsive economy. We are pleased to have been invited to appear before the Subcommittee today to offer our views on the North American Free Trade Agreement.

There are few public policy issues that have as much significance for the people and the ecology of Mexico, Canada, and the United States as does the proposed NAFTA. This NAFTA would not only impact on the well-being of people and communities in all three countries, but would also serve as a precedent for the establishment of free trade zones throughout Latin America, as envisioned in Bush's Enterprise for the Americas Initiative.

Greenpeace is gravely concerned about the proposed NAFTA as well as its prototype, the draft Uruguay Round GATT agreement. It is one thing to support the removal of trade barriers that protect the economic interests of a specific industry against the interests of the public at large. It is quite another thing, however, to say that trade and investment barriers should be removed through agreements that would also erode domestic health and environmental protection. This is precisely the threat posed by unregulated trade as embodied in the Bush NAFTA. We have seen this happen under the Canada-U.S. Free Trade Agreement and in the Bush administration's proposal for harmonization of standards in the Uruguay Round. The current NAFTA text will push us down the same ill-advised path.

We believe NAFTA is a fundamentally anti-environment agreement, particularly in its treatment of environmental standards, energy resources, conservation issues, and agriculture. We will explain our concern about the threat posed by NAFTA, and will comment on current proposals to negotiate "supplemental agreements" to address the environmental consequences of NAFTA.

In his speech of October 4, 1992, then Presidential candidate Clinton announced his support for NAFTA but underscored his commitment to ensure that free trade not undermine the goals of environmental protection or the interests of US workers. The key elements of his approach would include the negotiation of supplemental agreements and the establishment of an "environmental protection commission". In his remarks President Clinton touched on the problems of border clean-up, the enforcement of environmental regulations, the need to prevent and clean up water pollution, and the need for strict application of US pesticide regulation. Since his election, President Clinton has repeated his commitment to this approach.

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At the time Greenpeace and several other environmental, labor and consumer organizations expressed serious reservations about the viability of this approach for addressing the pervasive and adverse consequences that would result from the implementation of this trade agreement.

We continue to have these reservations and worry that the President's approach is based upon an incomplete assessment of the environmental implications of unregulated trade.

1. THERE MUST BE A FULL ASSESSMENT OF NAFTA's ENVIRONMENTAL IMPACT

It may be trite to note that before the environmental implications of NAFTA can be addressed, they must be fully identified and thoroughly assessed. Nevertheless, we appear to be on the verge of crafting solutions for problems that have yet to be satisfactorily identified or properly understood.

We are particularly concerned that there has yet to emerge a clear recognition by the Administration of pervasive and extensive environmental implications of unregulated trade and investment. Too often, the discussion of the inter-relationship of environment and trade has been reduced to pollution problems in the border region of the U.S. and Mexico, or the enforcement of domestic environmental regulation.

From the analysis undertaken by Greenpeace and many other groups it is clear that few aspects of the NAFTA are without serious environmental implications. Particularly problematic are those provisions crafted to encourage the exploitation for export of all natural resources, from water to energy.

It is clear that we have a considerable distance yet to go before we understand the complex inter-relationships that exist between trade and environmental policy objectives. Therefore we repeat the call for a thorough assessment of the environmental implications of the NAFTA. This task has clearly not been undertaken to date, and efforts by the Bush administration to promote NAFTA as an environmental panacea, with arguments akin to a "trickle-down" theory of environmental protection, do not represent a sincere effort to identify the environmental implications of the NAFTA.

The environmental movement has been virtually unanimous in demanding such an assessment, and we would urge the Administration to recognize the need to understand the full extent of the conflicts between present trade and environment policies before trying to craft solutions to these problems.

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2. BUSH's NAFTA WILL HARM THE ENVIRONMENT

As the Committee will also know, a number of environmental groups, including our own, have prepared critiques of NAFTA, the FTA and GATT. Repeating the important qualification that further assessment is needed, these analyses reveal pervasive and profound conflicts between NAFTA trade policies on the one hand, and those necessary to achieve environmental goals, on the other. It is the extent and character of these conflicts that underlie the concern expressed by our organization and dozens of others about the viability of trying to cure these deficiencies with supplemental agreements (see correspondence from the Alliance for Responsible Trade and the Citizen Trade Campaign to President Clinton, dated Dec. 15, 1992).

Were the environmental deficiencies of the NAFTA text to be essentially sins of omission, it is conceivable that supplemental agreements might provide a viable approach for correcting these oversights. However, several of the most problematic aspects of NAFTA are those provisions that establish rules of trade that are antithetical to those needed to confront pressing environmental problems. There are six specific deficiencies in the NAFTA which will be very difficult to fix in a "supplemental agreement."

2.1 NAFTA Weakens Our Ability to Insist on High Environmental, Health and Safety, and Labor Standards

The NAFTA text incorporates large parts of the draft Uruguay Round GATT agreement governing "technical standards" and "sanitary and phytosanitary measures." The former applies to government measures regarding health and safety, environmental standards, and consumer protection. "Sanitary and phytosanitary measures" are measures to protect human, animal and plant health. At stake are standards dealing with such questions as allowable pesticide residues on foods, and the use of food additives. Citizens in all three NAFTA nations, increasingly concerned about the health and safety of their environment and their food, have worked to raise these standards for the safety they provide to children and adults. Now the NAFTA may undermine these critical standards and limit the ability of legislatures to raise environmental standards.

The NAFTA maintains the principle that countries can decide what level of protection they want in order to promote legitimate objectives in the areas of environment, health and safety, and consumer protection. However, those measures must not create "unnecessary obstacles" to trade. The goal is harmonization through mutual recognition of the standards adopted by each country and ultimately through the adoption of common standards.

If a more stringent standard than that proposed is set by any one country, it is subject to discussion, review, and ultimately to dispute settlement procedures, with the outcome to be determined on the basis of scientific evidence. The major objection to these provisions is

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that they will effectively stop the public from pressing for more stringent regulations than those established by international codes such as Codex Alimentarius, or from regulating where no international consensus exists. For example, the international Codex Alimentarius on pesticide residue standards for food has been established through a process in which chemical and agribusinesses have been dominant. As a result, the Codex allows for residues of pesticides 50 times higher than those permitted by U.S. EPA and FDA regulations. Adoption of Codex-like standards could work more as a ceiling than a floor, thus inhibiting improvements.

NAFTA's Annex 2004 on "Nullification and Impairment" is particularly problematic. It states that if "any Party considers that any benefit it could reasonably have expected to accrue to it ... is being nullified or impaired as a result of the application of any measure that is not inconsistent with this agreement, the Party may have recourse to dispute settlement..." This could mean that environmental or consumer safety standards not addressed in NAFTA, even if they are consistent with NAFTA principles, could be challenged.

Environmentally unregulated trade promotes competition to lower standards. The trend in environmental protection has been to internalize environmental costs or externalities through the use of regulatory measures or economic instruments. Unregulated trade directly contradicts this trend of internalization of external environmental costs. Most environmental progress has been achieved when one jurisdiction raises the standard, thus encouraging others to follow. The EC and Japan's CO2 reduction goals are a good example, encouraging the US to follow suit, and to stop being a "free rider" [see Herman Daly and Robert Goodland, "An Ecological-Economic Assessment of Deregulation of International Commerce Under GATT," September 1992.]

International standards must be written into trade agreements as "floors," not "ceilings," so that countries and states are not deterred from enacting as stringent legislation as necessary to safeguard the health and safety of their citizens.

The Bush administration claimed that NAFTA is the most "green" trade agreement ever concluded -- a distinction of dubious merit given the profound failure of current trade agreements to even mention the environment. The claim rests on three arguments. The first argument, addressed above, is that NAFTA allows for the maintenance of high environmental standards. As noted, the standards provisions are really aimed at the harmonization of existing standards, and at limiting their impact upon "free" trade. The agreement provides no mechanisms or incentives for raising environmental standards.

Second, the Bush NAFTA says that the terms of some key international environmental agreements prevail over NAFTA obligations if a country is challenged on an environmental measure which is trade restrictive, **provided** that the least trade restricting enforcement

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policy available under the agreement is adopted. Thus the terms of the Montreal Protocol on Ozone Depleting Substances, the Basel Convention, and the Convention on Trade in Endangered Species prevail over NAFTA. While this is a step forward, the list of specified international conventions is very limited and can be added to only through agreement of all parties, providing an effective veto to all countries that may become a party to NAFTA; the terms of international conventions often represent the "lowest common denominator" of agreement between governments; and the least trade restrictive enforcement policy may well be the least effective. It must be recognized that the Bush Administration was the key actor blocking and weakening international environmental agreements at the 1992 Earth Summit in Rio.

Third, the Bush NAFTA says that a country cannot lower an environmental standard or regulation to attract investment. For example, we could not waive an emissions control regulation to attract a new smelter investment.

While this is a small step forward, it fails to address the key issues of standard setting or enforcement. NAFTA does not contain a comprehensive set of minimum environmental standards which must be maintained by all three countries. In addition, the agreement fails to address the fact of weak enforcement of standards in another jurisdiction. If a company was to leave a Canadian province with a high, enforced standard on, for example, toxic emissions, for a U.S. state with a low, unenforced standard, there is absolutely nothing that could be done about it. Yet the reality of the competitive environment in North America is that gross environmental abuse is tolerated by national and local governments in all three NAFTA countries.

Finally, NAFTA is completely silent on the issue of labor rights and standards. As a result, there is nothing to stop a country from gaining a competitive advantage through non-recognition of basic labor rights, such as the right to organize free and independent trade unions, nothing to establish a minimum wage, and nothing regarding worker health and safety standards.

2.2 NAFTA Exacerbates Global Warming, Poses Threat to Energy Efficiency and Conservation

The Bush administration's hemispheric energy strategy aimed to guarantee US "energy security" by using NAFTA, and subsequent free trade deals, to develop and ensure access to the vast energy resources of Canada, Mexico and Venezuela. The result of such a hemispheric policy would be to prolong inefficient and polluting resource use in the US, and displace conservation and efficiency investments with a cheap supply of fossil fuels from foreign sources. It is not surprising that the NAFTA is heavily backed by many of the transnational oil companies.

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Rules of energy trade among NAFTA parties must respond to the pressing ecological imperative of global warming by assuring the stabilization of greenhouse gas emissions and the reduction of CO2 emissions. For both Canada and the U.S., substantial reductions of the energy intensity of these economies is also required. Such a reduction in energy use is proposed in Vice President Al Gore's book, Earth in the Balance (1992, pp. 325-334). As currently written, Chapter 6 of NAFTA and its precursor in the Canada-US FTA fundamentally undermine these objectives.

In simple terms, the intent of the energy provisions of NAFTA and of the Canada-US FTA (CUSTA) is to encourage the development, exploitation and consumption of fossil fuels. Indeed, subsidies for fossil fuel exploration and development and for the military are they only subsidies sanctioned in NAFTA. Given the clear consensus of scientific opinion concerning the risks of failing to respond to the crises associated with global warming, these trade policy objectives are at best reckless, and at worst, suicidal.

Among the first discernible consequences of the CUSTA were two of the world's largest energy mega-projects, the James Bay hydroelectric project and the natural gas project in the Mackenzie Delta. Both will have devastating impacts upon fragile northern ecosystems and the indigenous peoples of those areas. Both are being developed almost exclusively to serve US markets. Both will flood the US with cheap energy resources, in part because of the environmental costs associated with these developments will be externalized, thus undermining the competitiveness of the efficiency and conservation initiatives that are vital if our economy is to be put on a sustainable and competitive footing.

The US is the world's largest consumer of non-renewable energy resources, and next to Canada, its most energy intensive economy. Trade policy should be devised to correct, rather than perpetuate, this unbalanced and unsustainable equation. By removing the ability of NAFTA parties to use export controls to regulate the extent to which energy resources are developed for export markets, this trade deal will perpetuate the CUSTA regime and fundamentally undermine the sovereign prerogatives of our governments to embark upon a different path -- a path that recognizes the ecological imperatives of curbing our voracious appetite for energy.

Equally destructive of environmental goals is Art. 608.2 of NAFTA, for continued government subsidies and tax incentives to encourage oil and gas exploration "in order to maintain the reserve base for these energy resources." This repeats Article 906 of the CUSTA, which formally recognized "the importance of government incentives for oil and gas resource development." Unless the NAFTA energy provisions are rewritten to acknowledge and incorporate the full costs of energy development and use, the unregulated "free" marketplace will continue to favor investments in destructive energy projects and ignore cleaner, more sustainable technologies. [See The North American Free Trade

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Agreement and Energy Trade, Prepared for Greenpeace by Carol Alexander and Ken Stump, 1992.]

By giving shelter to government subsidies for oil and gas mega-projects but leaving government support for efficiency and conservation entirely exposed to trade protest and sanction, the framers of NAFTA have gone as far as possible in skewing energy policy away from the programs and policies that are advocated by environmental organizations around the world. With the threat of trade sanctions looming over them, governments at every level will be very reluctant to support, through research and development, or by way of other industrial support programs, the type of innovation that is desperately needed to achieve efficiency goals.

Not only may government support for such initiatives be challenged as unfair subsidies, but least-cost energy planning may be attacked as a non-tariff barrier to free flow energy to US jurisdictions. For example, if Massachusetts passes a law now under consideration that would apply US environmental standards to power purchased from Hydro-Quebec's huge James Bay hydro project, Canada could challenge that law under NAFTA as a non-tariff barrier to trade. Although NAFTA allows "non-discriminatory" standards, it disallows "unnecessary obstacles" to trade. Thus energy reform initiatives on the state or provincial level which save energy and reduce consumption may be challenged as barriers to incoming energy supplies. Efficiency standards for machines and appliances, including those of the 1990 US Clean Air Act, could be seen as non-tariff trade barriers, since they prevent certain products from being sold in the US.

The Bush NAFTA ignores the fact that wind and solar energy systems are cost-effective even without the generous subsidies given to oil and gas producers. The agreement also ignores the reality that improved energy efficiency measures can halve US energy needs and save billions of dollars in fuel costs every year. By strengthening the political and physical infrastructure to develop, transport, and consume the fuels of the past, NAFTA ensures that the clean fuels of today must battle uphill every step of the way for acceptance. If this NAFTA is enacted, it will set energy reform in North America and efforts to combat climate change back by decades.

To address these problems therefore it is vital that the NAFTA package secure the right of all NAFTA parties to restrict the export of energy and energy resources to abate global climate change and achieve other environmental objectives. It must also protect least-cost energy programs, like subsidies to encourage conservation and renewables, from trade challenges. In addition, it should include provisions to encourage the transfer of appropriate energy efficient technology and to ensure that full environmental impact assessments are undertaken for all major energy projects.

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2.3 Environmental Impacts of NAFTA Agriculture Chapter

The Bush NAFTA threatens the survival of family farmers in all three countries. Yet there is no better paradigm of the principles of sustainable development, that is on one generation holding resources in trust for the next generation, than the family farm. If we lose family farms, we will lose our best hope for putting agricultural production on a sustainable footing. In order to make agricultural production ecologically sustainable (e.g. decreased production on marginal land and the use of fewer chemicals), then environmental and social costs must be internalized. This will not happen if family farmers have to compete with cheaper imports produced in less sustainable ways.

The first threat to sustainable agriculture in the NAFTA is the stated objective of increasing the scale of production. Provisions in the text will lead to both increased corporate concentration in the processing sector and the further expansion of large scale factory farms in all three countries. The second threat is the goal of eliminating each government's ability to regulate the importing and exporting of goods.

While US and Canadian farmers are understandably concerned about the impact of NAFTA on their livelihoods, the most severe impact will be on small Mexican farmers and farm workers. U.S. government studies conclude that opening the Mexican basic grain market will lead to increased rural unemployment and emigration from rural Mexico. Faced with the penetration of low cost U.S. corn and other grains into the Mexican market, between one million and one and a half million landless workers and members of indigenous farming communities will be forced to move to urban areas or to the U.S.

The winners in Mexico will be the wealthy fruit, vegetable and animal agro-exporters able to form joint ventures with U.S. agribusinesses who will be the biggest winners by far. They have the capital, technology and easy access to U.S. marketing channels necessary to take advantage of the NAFTA. The U.S. farm machinery that will arrive in Mexico duty free under NAFTA will be wholly inappropriate to the traditional farming systems operated by Mexican small farmers, but will facilitate the transition to industrialized farming with devastating environmental consequences.

Greenpeace believes that when the full social and environmental costs across the three nations of the NAFTA's agricultural provisions are balanced against projected export gains, the result is clearly negative. This agreement does not ensure that the economic benefits of unregulated trade will be broad based. It provides too many opportunities for capital and too few opportunities for people and their environment.

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2.4 NAFTA Conflicts with Internalization of Environmental Costs: the Need for Economic Sanctions to Protect the Environment

The Bush Administration's international policy of unregulated trade undercut any effort to develop a policy of internalization of environmental costs. A country which internalizes environmental costs into its prices will be at a disadvantage in unregulated trade with a country that does not internalize environmental costs by enforcing standards of environmental protection. If any of the NAFTA countries wishes to protect a policy of internalization of environmental costs, there is a clear justification for tariffs on imports from a country which does not internalize such costs.

The Bush NAFTA does not rule out consumption related standards if applied equally to both domestic and imported goods. But it does rule out process related restrictions. For example, pesticide-laced vegetables from Mexico or Canada can be kept out of the U.S. market if it fails to meet the same standards for pesticide residues as U.S. vegetables. Even in this case, however, purely non-discriminatory product specific standards have come under fire, and have been successfully challenged, as having created a de facto, if not a de jure, bias in favor of domestic products. When it comes to how goods are produced, however, NAFTA precludes the use of border measures such as tariffs to level the playing field at a higher standard of protection. Thus in the case of our vegetables, NAFTA precludes the use of import restrictions applied because Mexican or Canadian farm workers are exposed to pesticide poisoning more than are U.S. farm workers, due to lower safety standards or less rigorous enforcement.

Until all countries require the incorporation of environmental and social costs in the pricing of goods, the rules of free trade will make it very difficult for any country to adopt this policy of polluter pay. Lax regulation in Mexico may have resulted in downward pressure on U.S. environmental standards, which are generally higher than Mexico in terms of implementation, monitoring, and enforcement. Probably the main reasons for increasing U.S. investment in Mexico were the tariff advantages, low Mexican wages, lax rules on foreign investment, and proximity to U.S. markets. But ineffective environmental protection has been a critical factor in some investment decisions.

For example, from 1988 to 1990, a number of Los Angeles wood furniture manufacturers subject to strict new clean air regulations moved to Tijuana where there were no comparable air quality standards. According to the U.S. General Accounting Office, although low wages were also an attraction for these firms, 78 percent cited strict air pollution control standards as an important reason for leaving California.

A threat to relocate by an important industry is often enough to discourage a government from proceeding with a regulatory initiative that will impose pollution control costs not borne by firms operating in other jurisdictions. Moreover, lax enforcement of environmental

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laws in a neighboring country that is a trading partner is a disincentive to aggressive pollution control and prevention programs. A trade agreement without provisions for production process regulation will accelerate destruction of the environment in the entire region and place further pressure on environmental agencies to lower standards. This may jeopardize the goal of sustainable development in all three countries. This points to the need to provide for trade measures in a new NAFTA which would make competing firms incur economic penalties rather than rewards for externalization of environmental costs. [George Foy, "Environmental Protection versus Intellectual Property Protection: The US-Mexico Free Trade Agreement Negotiations," Joint Economic Committee, U.S. Congress, 1992.]

Trade measures in a new NAFTA, or in an environmental protocol that would prevail in the event of conflict with the provisions of the NAFTA, could be designed with two objectives: to achieve a 'level playing field' and to direct compensatory finance to Mexico to support environmental protection and the reduction of social disparities both between and within countries. One mechanism would be to repatriate import tariffs levied on products whose price does not reflect the full environmental costs to the exporting country. Tariff revenues could be targeted at improved enforcement and meeting higher environmental standards.

For the longer term, the three NAFTA countries should negotiate upward harmonization of environmental standards, worker rights and social legislation. Harmonization could be linked in some way to the schedule of trade and investment liberalization already in the agreement. Canada and the U.S. should consider creating an adjustment fund to help Mexico improve environmental and workplace inspections.

2.5 NAFTA Promotes Trickle-Down Economics for Mexico

In Mexico, NAFTA will benefit a small group of wealthy entrepreneurs who have a clear history of not passing on the benefits of new investments to workers. Furthermore, the Mexican government has an explicit strategy to compete internationally through low wages and lax enforcement of environmental and health standards.

Unless a NAFTA explicitly embraces strict enforcement of environmental standards and labor rights and includes measures to raise Mexican wages, there will be no "trickle down," and it will be impossible to build more equitable and sustainable development anywhere on the continent. Nor, for that matter, will it be possible to achieve balanced trade within the region. Likewise, any agreement should also address Mexico's huge foreign debt burden, which further stimulates social and environmental "dumping."

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2.6 NAFTA's Accession Clause Will Spread These Deficiencies

The accession clause of NAFTA, Article 2205, states that other countries in the hemisphere may join NAFTA. The provision opens the door for rapid negotiations rather than thoughtful debate with or within these countries. The deficiencies discussed above will be replicated, rather than remedied. Rapid accession will also accelerate the same "trickle-down" approach to growth that has been pushed across Latin America in the structural adjustment programs of the World Bank and the International Monetary Fund. Instead of building the kind of sustainable and equitable development which is vital to raising standards across the hemisphere, NAFTA and its extension south encourages inequitable growth for the few, based on continued exploitation of the environment and workers of the hemisphere.

3. SUPPLEMENTAL AGREEMENTS

On the subject of supplemental agreements and in response to the Administration's commitment to establish a North American Commission on the Environment (NACE), we offer the following cautions:

The only way in which domestic environmental legislation or initiatives can be rendered immune from challenge under the rules of trade - as they currently exist under the FTA and GATT, and as proposed by the NAFTA and new GATT agreement - is to make them explicitly exempt from the application of the trade remedies engendered by those agreements. This obviously requires the concurrence of other parties to NAFTA, the FTA and GATT. To put this another way, unilateral domestic legislation by any of our countries will do nothing to preserve such initiatives from trade challenges.

Conversely, the only viable mechanism to ensure compliance by other countries with international norms, other than moral persuasion or force, is the use of economic sanctions. It is by virtue of creating regimes that authorize the use of such sanctions, that trade agreements derive their force and compelling effect.

By the same token, it is the trade or economic sanctions authorized by a small number of international environmental agreements that gives them particular strength and influence. It is not inappropriate to consider such IEAs, eg. the Montreal Protocol, as being in essence, trade agreements. On the other hand an IEA that includes no such enforcement regime, of which examples abound, is more often than not purely hortatory or rhetorical.

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Given these facts, it is apparent that for an environmental protocol to address the deficient and counterproductive provisions of the current NAFTA that the protocol must:

- a) be comprehensive, and address all of the adverse environmental consequences of unregulated trade;
- b) be endorsed by all NAFTA parties;
- c) be supported by the same trade/economic sanctions that give international trade agreements force and effect, and;
- d) be made explicitly paramount to the NAFTA in the event of conflict.
- e) must be supported by compensatory finance to make it workable in all NAFTA countries so that these measures do not unfairly penalize poorer countries or regions.

We believe the most direct way to achieve these objectives is to amend NAFTA and other current and proposed trade agreements accordingly. We are aware that the Administration is committed to another course, and we wish to remain open minded to supplemental agreements that would satisfy the above criteria.

By way of conclusion, we need to stress the importance of rethinking, in the most basic way, the assumptions that underlie current trade policies. Merely tinkering at the edges with a trade agreement that strives to entrench principles of development that are unsustainable will do little to address the fundamental limitations of the current paradigm -- that it is only through perpetual growth that social and environmental needs will be met.

If we are serious about our concern for this planet, and about the legacy we will leave future generations, then we must be willing to recognize the urgency of turning current economic and trade policy from its present path -- a path that has consequences so overwhelming that the very survival of our species is at risk. Indifferent to this imperative, current and pending trade agreements seek to stay the present course and even accelerate our progress along it. It isn't possible for us to overstate the gravity of the consequences that will follow should this agenda continue to prevail.



THE EFFECT OF THE PROPOSED NORTH AMERICAN FREE TRADE AGREEMENT
ON THE ENVIRONMENT, WILDLIFE, AND NATURAL RESOURCES:
OPPORTUNITIES AND DANGERS

TESTIMONY OF WILLIAM J. SNAPE, III
ASSOCIATE COUNSEL, DEFENDERS OF WILDLIFE

BEFORE THE HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE
SUBCOMMITTEE ON NATURAL RESOURCES AND THE ENVIRONMENT

MARCH 10, 1993

ON BEHALF OF:

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SUMMARY STATEMENT

Mr. Chairman, my name is William J. Snape, III, Associate Counsel for Defenders of Wildlife. I appreciate the opportunity to testify on behalf of Defenders, our 80,000 members, and the groups listed on the cover page about the proposed North American Free Trade Agreement (NAFTA) and its effect upon the environment, wildlife, and natural resources of this continent. I request that this testimony and its appendices be printed in their entirety for the record.

Defenders of Wildlife is a non-profit advocacy group that concentrates its efforts upon combatting species extinction and the overall loss of biological diversity. We have been involved with the Convention on International Trade in Endangered Species of Flora and Fauna (CITES) since its inception. CITES bans international trade in wildlife, fish, and forest products that is unsustainable for a given traded species. Defenders believes that NAFTA should support and extend the principle of sustainability to protect wildlife affected by trade. In the last several years, Defenders has taken a keen interest in international trade agreements like NAFTA because of the growing influence these agreements have upon wildlife conservation.

The debate surrounding job losses due to NAFTA resembles the environmental and conservation concerns over the agreement. The environmental dangers of NAFTA lie not only in the pollution and harvesting generated by increased or shifting trade, but also by investment in non-sustainable practices that could be institutionalized by it. Because this is the first trade agreement to so directly link a developed and developing country, and because the U.S. and Mexico share an almost 2000 mile border, special attention has been focused on the very real differences between the U.S. and Mexican environmental regimes.

Opportunities lie in establishing an effective development paradigm under NAFTA, which could make sustainable growth possible with environmentally friendly practices and technologies. Successful environmental cooperation could establish a successful example for GATT and international financial institutions like the World Bank and International Monetary Fund (IMF). Given these realities, Defenders is very pleased and relieved that President Clinton has called for an environmental agreement to supplement NAFTA. One of the core problems with the existing NAFTA is that it was negotiated with environmental and conservation concerns separate from the agreement's economic framework, on what was called a "parallel track."

Although industrial pollution along the border and in cities like Mexico City has received the bulk of attention among environmentalists, NAFTA's effects upon wildlife and its habitat

must be identified and addressed in order to effectively conserve this continent's biological diversity. NAFTA also must not affect the parties' obligations under existing treaties and agreements, like the biodiversity treaty to which Mexico and Canada are signatories. At present, the U.S. Fish and Wildlife Service (FWS) simply does not possess the personnel or funding to deal with U.S.-Mexican conservation concerns affecting the U.S. Along the border, for instance, it is very difficult for the FWS to adequately enforce existing restrictions on wildlife traffic under the U.S. Endangered Species Act, 16 U.S.C. Sections 1531 et seq., and CITES.

In the U.S., NAFTA will increase human traffic along the border and place additional pressure on the natural resources of southwestern Texas, southwestern New Mexico, southern Arizona, and southern California. Surface and subsurface water sources will be stressed further. Development could fragment wildlife habitats, threatening the various ecosystems' biological diversity. Also of immediate concern are the many bridges that will be erected between the U.S. and Mexico. Along the Rio Grande, from the Gulf of Mexico to Del Rio (TX) alone, more than 20 bridges have already been proposed. Equally troublesome is the proposed drug interdiction road along the entire stretch of the U.S.-Mexico border. These bridges, roads or other "action(s) authorized, funded, or carried out" by the Office of the U.S. Trade Representative, Department of Transportation, or any other federal agency should be carried out in compliance with U.S. conservation and environmental laws. See e.g., ESA, Sec. 7.

In the interior of Mexico, NAFTA could induce and perpetuate harmful land use practices, as well as risk the long-term economic viability of its natural resources. NAFTA-driven investment will likely threaten already stressed Mexican water, forest, animal, and plant resources. Sovereignty concerns and restraints limit NAFTA's ability to deal with all of the environmental problems in the interior of Mexico, except those caused, perhaps, by border pollution. Cooperative efforts between the U.S. FWS and Mexico, though not directed at enforcement and lacking money, should continue and increase with NAFTA.

The NAFTA parties must forcefully address the enforcement of existing environmental laws in Mexico, the U.S., and Canada. Because U.S. citizens should not be subjected to economic or environmental injury as a result of weak enforcement of environmental standards elsewhere, a trilateral North American Commission on the Environment (NACE) should be established to enforce existing environmental standards. The NACE should possess investigative, monitoring, enforcement and dispute settlement powers.

Under a proposal by Defenders and the Center for

International Environmental Law, NACE would be granted environmental dispute settlement authority to address lax enforcement. If a NACE dispute panel verifies a complaint by a party or individual, then that trade-injured party or individual should be able to pursue the already existing "snap-back" tariff provisions of NAFTA Chapter 8. If a non-trade injury (i.e. environmental) injury is suffered as result of NAFTA, this proposal would allow NACE to levy a fine. Crucially, this proposal channels enforcement funds received by these remedies into rectifying the environmentally degrading activity at issue. Of course, NACE's enforcement authority would not limit any injured individual's right to pursue remedies under existing or future U.S. law.

Such an enforcement mechanism by NACE would finally implement the "polluter pays" principle into a trade agreement. Although GATT has continued to resist incorporating this principle, primarily because some countries fear that environmental standards will become disguised barriers to trade, the NAFTA environmental protocol provides the opportunity to forcefully state that environmental lawlessness creates unacceptable economic and environmental injuries.

One major obstacle precluding adequate environmental enforcement in Mexico is money. Another related obstacle is the lack of available technological expertise in Mexico, which often leads to either insufficient technical regulations to implement environmental laws or environmental noncompliance by specific industries. Therefore, along with the Environmental Business Council, an association of firms that manufacture environmental products and services, Defenders proposes to link enforcement mechanisms under NACE to formal technological and management assistance.

Yet NACE is not a total panacea for NAFTA. The present text possesses many problems, which are addressed in the letter signed by 25 groups to Ambassador Kantor on March 4. These problems arise in regard to clean-up of the border region, funding, production/process (PPM) standards, product and other consumer/labor standards, investment in Mexico, international environmental agreements, energy, agriculture, government procurement, the impact on state and local laws, and incorporation of troubling GATT language in the NAFTA text. An effective environmental protocol could solve many of these problems, by either adding or clarifying certain provisions, without explicitly renegotiating the text.

For example, trade law must recognize that how a product is produced is as important as the quality of the product itself. Only by recognizing process-based trade restrictions will governments retain their ability to keep high domestic standards without placing domestic producers at a competitive disadvantage.

Although Article XX of the General Agreement on Tariffs and Trade (GATT) provides for health and natural resource conservation exceptions, these provisions have been constricted by recent GATT panel decisions, and could be incorporated into NAFTA. In the tuna/dolphin trade dispute brought by Mexico against the U.S., a GATT panel held that harvesting methods were not a GATT-legitimate basis for distinguishing between, and placing import restrictions on, dolphin deadly tuna. As a result of this decision and after considerable political negotiation, Mexico agreed to join the U.S. in a global moratorium on the setting of nets on dolphin and to use the moratorium as a basis for prohibiting imports of tuna caught by killing or harassing dolphins. To date, Mexico has failed to enter into the moratorium. The failure of such agreement to be effectively implemented serves to underscore the necessity for specific text in the NAFTA package setting forth the right of NAFTA parties to set standards and distinguish between products on the basis of production methods. See International Dolphin Conservation Act, P.L. 102-523. It also underscores the need to demand that Mexico immediately enter into the moratorium agreement as a precondition to NAFTA.

Furthermore, both the negotiation and implementation of NAFTA must be made more accessible to citizens. A long standing habit in international trade, certainly not shared by most environmental policy makers or the U.S. governmental system, is the closed and secretive nature of negotiations and dispute settlements in trade agreements. Thus, for starters, trade agreements such as NAFTA should necessitate environmental impact statements under the National Environmental Policy Act (NEPA). Also, to fully effectuate public involvement in NAFTA's implementation, the agreement's present dispute process needs to be changed. Not only are the present NAFTA dispute panels completely closed to the public, but the parties to NAFTA possess the authority to prohibit citizens from final review of panel decisions.

The tense politics and high stakes of NAFTA make the agreement highly susceptible to overly broad and potentially untrue assertions by both sides of the debate. Unfortunately, the large number of gray areas in the present text fuels various anxieties. From an environmental standpoint, free trade should be a means to an end and not the end itself. We all have much work to perform if a successful environmental protocol is to be established. In order to realize the impressive potential of NAFTA, "traditional" rules of international trade must be reformed to fully and completely integrate environmental, conservation, health, and safety concerns.

Mr. Chairman, this concludes my oral testimony.

I. INTRODUCTION: THE OPPORTUNITIES AND DANGERS OF NAFTA

Cliche or not, the North American Free Trade Agreement (NAFTA) presents tremendous opportunities and dangers. These opportunities and dangers exist for the people and governments of the United States, Canada, and Mexico. And they exist for the continental and global environment.

NAFTA will create and continue several significant economic trends. First, it will spur considerable U.S. and foreign investment in Mexico. Second, it will continue breaking down tariff and non-tariff barriers among all three countries. Third, it will accelerate the existing displacement of certain workers in all three countries.

The latter phenomenon was, of course, the subject of considerable debate during the 1992 campaigns, when Ross Perot stated there would be a "sucking sound" as American jobs fled to Mexico. Just recently, Canadian Prime Minister Brian Mulroney announced his intention to resign in June, largely because of the public's perception that the Canadian-U.S. Trade Agreement, which Mulroney supported, caused double-digit unemployment rates. The basic question for the U.S. President and Congress is whether job losses due to business relocation will offset job opportunities created by an expanded continental market. In other words, in terms of American jobs and short-term competitiveness, NAFTA possesses opportunities and dangers -- the reason President Clinton has called to strengthen NAFTA with supplemental agreements on workers' rights and "import surges."

The debate surrounding job losses due to NAFTA resembles the environmental and conservation concerns over the agreement. The environmental dangers of NAFTA lie not only in the pollution generated by increased trade, but also in the non-sustainable investment patterns that could be institutionalized by it. Because this is the first trade agreement ever directly linking a developed and developing country, and because the U.S. and Mexico share an almost 2000 mile border, special attention has been focused on the very real differences between the U.S. and Mexican environmental regimes.

Yet, opportunities lie in establishing an effective development paradigm under NAFTA, which could make possible sustainable growth through environmentally friendly practices and technologies. Successful environmental cooperation could establish a successful example to GATT and international financial institutions like the World Bank and International Monetary Fund (IMF). Given these realities, most in the

financial institutions like the World Bank and International Monetary Fund (IMF). Given these realities, most in the environmental community are very pleased and relieved that President Clinton has called for a supplemental agreement, or protocol, on NAFTA environmental protection.

All of this is not to say that NAFTA alone will dictate continental growth in the 21st century. Under President Salinas, Mexico has moved toward a more liberalized economy and government, placing less responsibility upon the recently streamlined federal government and more on free-market economics and open politics at the state and local level. While these moves may be desirable overall, they have spawned unhealthy side-effects such as centralized agriculture, and which often encourages increased chemical use and farming methods like monoculture. This agricultural trend continues to displace many Mexican farmers, and NAFTA will likely exacerbate it.

Irrespective of NAFTA, the societies and economies of the U.S., Mexico, and Canada will probably continue to become integrated. Just last year, there were almost 200 million crossings each way between the U.S. and Mexico. Thus, the fundamental question about NAFTA is whether such integration, involving the transfer of trillions of dollars, will be constructive or disastrous. Although NAFTA alone may not determine the continued growth of this continent, it will be an extremely powerful force if implemented by the three countries.

II. THE AGREEMENT AND ITS "ENVIRONMENTAL PROVISIONS"

One of the core problems with the existing NAFTA is that it was negotiated with environmental and conservation concerns separate from the agreement's economic framework (called a "parallel track" by the previous administration). The agreement's chapters on energy and transportation, for example, virtually ignore environmental considerations despite these sectors' environmental significance. Consequently, NAFTA's stated aim to "promote sustainable development" is really not much more than "window dressing." While in theory it might be preferable to renegotiate the entire agreement, the Clinton Administration can accomplish substantial, meaningful, and productive environmental reforms with a NAFTA environmental protocol.

The NAFTA that the Bush Administration submitted to Congress on September 18, 1992, and signed on December 17, shows some environmental progress, at least compared to earlier leaked drafts. A full analysis of NAFTA's environmental provisions, as

well as a description of improvements recommended, is included in a letter, drafted by Defenders and several other groups, addressed to U.S. Trade Representative Mickey Kantor. This letter is attached as an appendix to this testimony. This letter addresses the issues of environmental enforcement, funding needs and options, clean-up of the border area, process/production method (PPM) standards (e.g. tuna/dolphin), product and other consumer/labor standards, general investment, international environmental agreements, energy, agriculture, government procurement, NAFTA's impact on state and local laws, as well as inconsistent and problematic GATT language contained in NAFTA.

III. THE EFFECT OF NAFTA UPON HABITAT AND WILDLIFE CONSERVATION

Although industrial pollution along the border and in cities like Mexico City has received the bulk of attention among environmentalists, NAFTA's effects upon wildlife and its habitat must be identified and addressed in order to effectively conserve this continent's biological diversity. At present, the U.S. Fish and Wildlife Service (FWS) simply does not possess the personnel or funding to deal with U.S.-Mexican wildlife and natural resource conservation concerns.

Along the border, for instance, it is very difficult for the FWS to adequately enforce existing restrictions on wildlife traffic under the U.S. Endangered Species Act, 16 U.S.C. Sections 1531 et seq., and the Convention on International Trade in Endangered Species of Fauna and Flora (CITES). Although Mexico became a party to CITES in 1991, significant illegal trade is feared to emanate from Mexico. According to a World Wildlife Fund Traffic study, the increased transport and tourism likely to occur because of NAFTA will result in increased wildlife trade, both legal and illegal. In order to prevent illicit traffic in leather goods, birds, sea turtle products, and other endangered species, both FWS and Mexico's Secretariat of Social Development (SEDESOL), as well as the Agricultural Secretariat (SARH) and Fisheries Secretariat (SEPESCA), will need increased enforcement resources.

In the U.S., NAFTA will increase human traffic along the border and place additional pressure on the natural resources of southwestern Texas, southwestern New Mexico, southern Arizona, and southern California. Surface and subsurface water sources will be stressed further. Development could fragment wildlife habitats, threatening the various ecosystems' biological diversity. Eight U.S. national wildlife refuges (NWR) are inside 25 miles of the border. Many migratory birds travel among all

three NAFTA parties. The U.S. has an obligation under existing treaties with Canada (1916) and Mexico (1936) to conserve migratory birds. Each of the potential NAFTA parties possesses obligations to other non-NAFTA countries to conserve wildlife. For example, the U.S. has obligations to conserve migratory birds, polar bears, and tuna with other countries. None of these obligations should be undermined by sudden increases in harvests, pollution, habitat destruction, or introduction of exotic species that may flow from NAFTA.

According to FWS estimates, at least 460 endangered, threatened, proposed, and candidate species of plants and animals are inside 25 miles of the U.S.-Mexico border. A present agriculture project in Sonora, Mexico already affects the springs from San Bernadino/ Leslie Canyon NWR in Arizona; the endangered Yaqui chub, endangered Yaqui topminnow, and endangered shiner all depend upon these springs as essential habitat.

Also of immediate concern are the many bridges that will be erected between the U.S. and Mexico. Along the Rio Grande, from the Gulf of Mexico to Del Rio (TX) alone, more than 20 bridges have already been proposed. As the FWS states, "each bridge and its approaches has the potential to destroy brush and riparian habitats; multiply human presence, lighting, noise, air pollution; and affect the management of state and federal refuges." Considering that all of Texas has only 4 bridges connecting it to Mexico over the Rio Grande presently, these bridge proposals raise serious concerns. Equally troublesome is the proposed drug interdiction road along the entire stretch of the U.S.-Mexico border. FWS believes that such a road will negatively impact wildlife habitat and corridors.

In building these bridges and/or roads, the Office of the U.S. Trade Representative, the Department of Transportation, or any other federal agency shall insure that "any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species ..." ESA, 16 U.S.C. Section 1536(a)(2). Section 7 consultation under the ESA is required when a federal action, which includes federally funding a project in whole or in part, may affect any listed species. There is no requirement that actual harm to listed species be shown prior to initiation of Section 7 consultation. See 50 C.F.R. Section 402.14(a) ("Each federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required ...") (emphasis added); 51 Fed.Reg. at 19949 (1986) (explaining "may affect" standard). Among the threatened and endangered species that could be affected along the border, in addition to those mentioned previously, are the ocelot, jaguarundi, jaguar,

peregrine falcon, Sonoran Pronghorn antelope, Mexican spotted owl, Mexican wolf, masked bob-white quail, and desert tortoise. 50 C.F.R. Sections 17.11-12. See also National Environmental Policy Act (NEPA), 42 U.S.C. Sections 4331 et seq.; Clean Water Act, 33 U.S.C. Section 1344; Fish and Wildlife Coordination Act, 16 U.S.C. Sections 661 et seq.

In the interior of Mexico, NAFTA could induce and perpetuate harmful land use practices, as well as risk the long-term economic viability of its natural resources. NAFTA-driven investment will likely threaten already stressed Mexican water, animal, and plant resources. A report by Proyecto Fronterizo de Educacion Ambiental and the Border Ecology Project estimates that Mexico possess 30,000 plant species, 1,000 bird species and 1,500 mammals, reptiles and amphibians -- making it one of the most biologically diverse countries on this planet. In fact, approximately 15% of Mexico's plant and animal species are found nowhere else on earth. A commitment by the NAFTA parties to revitalize the Convention on Nature Protection and Wildlife Preservation (Western Hemisphere Convention) would be an important component for protecting wildlife and ecosystems throughout not only Mexico, but also in other countries in the western hemisphere that want to eventually accede to NAFTA.

Mexican biodiversity, however, is threatened not only by the pollution caused by the maquiladoras, but also by over-intensive extraction of natural resources often aided by foreign investment or ill-advised World Bank loans. Approximately 2 million acres are lost from Mexico's forests annually. SARH (Secretariat for Agriculture and Water Resources), responsible for Mexico's forests, has tilted strongly toward timber production policies, paying scant attention to the biological health of forest ecosystems. As a result, Mexico loses 560 million tons of fertile topsoil every year, literally causing 1500 acres of Mexican land to turn into a desert.

Sovereignty concerns and restraints limit NAFTA's ability to deal with all of the environmental problems in the interior of Mexico, except those caused, perhaps, by border pollution. Both Congress and the Administration should be aware that serious problems exist in Mexico. Yet, if NAFTA merely allowed true public participation in environmental dispute settlements, investigations, and monitoring, Mexican citizens would gain public enforcement power greater than they presently enjoy. Indeed, many Mexican environmentalists believe that if NAFTA promoted democratic principles in its procedures, these procedures would catalyze increased democratic participation in Mexico itself. At present, Mexico does not even possess basic citizen "right to know" rights.

Cooperative efforts between the U.S. FWS and Mexico, though not directed at enforcement and lacking money, should continue

and increase with NAFTA. Since 1936, the two countries have shared certain research and management responsibilities for migratory birds. In 1974, the Joint Committee on Wildlife and Plant Conservation implemented a cooperative program of training and management. Additional conservation projects between all three NAFTA parties have resulted from the 1988 Tripartite Agreement for the Conservation of Wetlands and their Migratory Birds. Cooperative efforts could improve enforcement, continue training Mexican wildlife experts, provide expertise on infrastructure engineering such as bridge construction, pursue linking national parks and refuges, enhance the survival and recovery of many cross-border and migratory species, expand fisheries management research with the Secretariat of Fisheries (SEPECSA), utilize technology like GAP analysis, and educate the Mexican public. The U.S. Agency for International Development's (AID) \$5 million dollar program (1990-94) to protect important Mexican tropical forests is another potential opportunity; however, AID should consult with the FWS under Section 7(a)(2) of the ESA, a process AID has so far refused to do.

The conservation of biological diversity is best achieved through the conservation of the habitats and ecosystems upon which species depend, as well as the promotion of unsustainable harvest, pollution, and exotic species introductions. One potentially promising cooperative avenue is the expansion of RESERVA, the Reserve Managers Training Course already operational on a small scale. In addition, the FWS has asserted that any funds it expends on projects will follow the strict guidelines of the FWS's existing Western Hemisphere Program. The Western Hemisphere program, incidentally, will become increasingly important as other countries in this hemisphere seek to accede to NAFTA. Chile and the U.S. have already communicated about potential NAFTA accession.

IV. THE QUESTION OF ENVIRONMENTAL ENFORCEMENT UNDER NAFTA

A. BASIC ENFORCEMENT QUESTIONS

By stating, "we need a supplemental agreement which would require each country to enforce its own environmental and worker standards," President Clinton recognizes the continued concern about enforcement of existing environmental laws in Mexico. Because U.S. citizens should not be subjected to economic or environmental injury as a result of weak enforcement of environmental standards elsewhere, a trilateral North American Commission on the Environment (NACE) should be established to enforce NAFTA-related standards. Without adequate safeguards, the U.S.'s high environmental standards could turn into a competitive disadvantage for domestic business. In a recent

study, included in this testimony's appendix, Friends of the Earth (FOE) estimated that in 21 industries, the "profit boost" gained by U.S. businesses operating in Mexico averaged 160%, if these businesses failed to comply with Mexico's environmental standards. Economist Duane Chapman from Cornell University has made similar findings.

Because NAFTA is a trade agreement, enforcement mechanisms under NAFTA should be primarily trade-based. As such, injunction or mandamus powers probably should not be extended beyond present international and domestic law. In other words, NAFTA should not authorize a NAFTA party or official to close down a Fairfax, VA waste site, unless that site creates a trade distortion, or an environmental injury in Mexico or Canada. But trade-based remedies must be available and forcefully implemented if sub-standard environmental practices create a trade injury. Such a policy directive would finally implement the "polluter pays" principle, espoused by the Organization for Economic Cooperation and Development (OECD), into a trade agreement. Although GATT has continued to resist incorporating this principle, primarily because some countries fear that environmental standards will become disguise barriers to trade, the NAFTA environmental protocol provides the opportunity to finally state that environmental lawlessness, its effect upon the environment aside, creates unacceptable economic distortions.

Along with the Center for International Environmental Law (CIEL), Defenders has drafted a protocol proposal that would allow the North American Commission on the Environment (NACE), discussed *infra*, to authorize a trade-injured NAFTA party to pursue already existing "snap-back" tariff provisions of NAFTA's Chapter 8. If an environmental injury is suffered as result of NAFTA, the CIEL/ Defenders proposal would allow NACE to levy a fine. At least one Mexican, Homero Aridjis, President of Mexico's Grupo De Los Cien (Group of 100), has said that NACE should be "empowered to issue recommendations and to adopt decisions binding on the three parties" (emphasis added). The CIEL/Defenders proposal utilizes enforcement funds received by these mechanisms by channeling them into rectifying the environmentally degrading activity. Of course, NACE's enforcement authority would not preclude any injured individual with standing to pursue remedies under existing U.S. law.

One major obstacle precluding adequate environmental enforcement in Mexico is money. Despite improvements by its predecessor SEDUE, SEDESOL is still not able to either monitor or enforce many violations. SEDESOL, quite simply, needs more skilled employees with more financial resources. For example, seven SEDESOL staffers were forced to evaluate roughly 800 environmental impact assessments in 1991.

Another related obstacle is the lack of available

environmental laws or environmental noncompliance by specific Mexican industries. Therefore, along with the Environmental Business Council and others, Defenders proposes to link enforcement mechanisms under NACE to formal technological and management assistance. Under the proposal, a NACE task force would be established whenever a lax enforcement complaint was lodged with NACE. The task force would identify the enforcement problem, potential solution(s), and implementation recommendations. All task force proceedings would be transparent. Each task force, in conjunction with the NACE disputants, would have 120 days to make technical recommendations, which would result in either a binding memorandum of understanding by the disputants (approved by the NACE) or as part of the record to the NACE dispute panelists if consultation did not lead to a MOU.

Although the Bush Administration's argument that NAFTA will bring increased revenue to Mexico for environmental enforcement could eventually become reality, absolutely nothing guarantees such a result. Article 1114 of NAFTA recognizes the danger of investment driven pollution havens but offers no enforceable solution. Furthermore, NAFTA's energy chapter allows subsidies for oil and gas exploration, which could create tremendous pollution and harm to habitat. NAFTA must conceptually link enforcement problems with investment realities by allowing and encouraging financial incentives in and among all three countries that promotes sustainable growth. See e.g., Good Neighbor Environmental Act of 1992, P.L. 102-532, introduced by Rep. de la Gaerza (D-TX). Not only must funds raised by NAFTA environmental enforcement be dedicated to clean-up and sound infrastructure, but "green" subsidies must be permitted. Mexico reportedly has in law a program called "Productive Ecology" that offers credits to communities willing to start economic practices that are environmentally sound; this program should be greatly expanded to accommodate the changes that NAFTA will bring.

But enforcement of existing standards is not a total panacea. Despite strides made by Mexico since the mid-1980s to raise various environmental standards, many Mexican standards themselves are not sustainable. Consequently, living and non-living natural resources are besieged and pollution continues. Sovereignty restraints and principles of sustainable development, however, limit U.S. options vis-a-vis Mexican standards to a degree. One promising proposal is to upwardly harmonize continental standards through the standards committees already contained in NAFTA Articles 764 and 913; all options need to be analyzed. These committees could be linked to the enforcement mechanisms of NACE. Furthermore, NAFTA must in no way preclude a country like the U.S. from implementing and enforcing standards that limit, tax, tariff, or forbid certain imports or exports based upon environmental concerns.

based upon environmental concerns.

B. MAQUILADORAS

Nowhere is the lack of enforcement capabilities more evident than along the border, where several border agreements between the U.S. and Mexico have not yet prevented the abnormally high rates of death and disease around the maquiladoras. Abnormally high rates of death and disease in the border area merely underscores the environmental apocalypse that has gripped the border region. Because of the dangerous extent of border pollution, approval of the final NAFTA should be directly linked to an enforceable and well-funded clean-up plan. Such linkage would also enhance wildlife conservation along the border and in the interior of Mexico. At present, the two chief documents governing border pollution, the 1983 La Paz Agreement and the Integrated Environmental Plan for the U.S.-Mexico border, as well as the International Boundary and Water Commission (IBWC) that has some jurisdiction over transboundary surface waters, have been largely unable to remedy the problem of border pollution. Because border pollution has such direct effects upon human health, several border advocacy groups have recommended that NACE be NACHE, for health and the environment.

C. WILD BIRDS

Another serious environmental/conservation concern is the effect of NAFTA on illegal wildlife trade, particularly the trade in exotic wild-caught birds. According to Department of Justice figures, approximately 100,000 exotic birds are smuggled into the United States from Mexico each year. Smuggled birds are drugged or fed tequila, bound in newspaper and stuffed into door panels and tire wells and driven across the Mexico border. Rafts of smuggled birds have been found floating across the Rio Grande. (Smith-sonian, April, 1985). Some conservation groups estimate that as many as one-fifth of the large parrots sold in the United States have been illegally imported.

As would be expected, mortality rates are very high with smuggled birds. In one widely reported instance, 20 amazon parrots from Mexico were concealed behind the two headlights of a car driven across the Mexican border. All of the birds were dead when confiscated by Customs officials.

"Operation Psittacine" in 1989 was the first major covert operation of the U.S. Fish and Wildlife Service targeted at bird smugglers. Birds valued at \$468,000 were confiscated, including several Mexican and Latin American species. A total of 36 people in six states, including Texas and California, were arrested and prosecuted for felony violations.

This illegal trade is not limited to Mexican species, such as the Mexican double yellow headed Amazon, a commonly smuggled species, but also includes species from throughout Central and South America and even as far away as Indonesia. Black palm cockatoos from Indonesia can be found in Tijuana markets for prices as high as \$10,000 despite its highly endangered and protected status in both Indonesia and the United States. According to former Department of Interior Secretary Don Hodel, 26,000 exotic birds are illegally smuggled across the Mexican border each year near the port of Brownsville, Texas alone.

Mexico is widely reputed to be the primary source for smuggled birds in the United States. According to the Sunday Telegraph, London, England, "Mexico has become the focus of the [wild bird] trade. . . . Other South American countries are struggling to protect their wildlife, but Mexico is undermining those efforts by its role as a funnel for the traffic."

Besides the conservation and mortality issues with illegal bird imports, serious agricultural threats also exist since smuggled birds obviously bypass the normal quarantine process--designed to protect U.S. poultry from parrot-borne diseases. Smuggling thus presents a risk of a major outbreak of Newcastle's disease, which caused more than \$ 56 million in losses of poultry in 1972 due to an outbreak that spread from diseased imported exotic birds.

Loosening of trade restrictions without adequate environmental safeguards and border inspections can only encourage even more problems with illegal wildlife trade. Unless Mexico can demonstrate that it is able to control its illegal wildlife shipments, the United States alone should not be expected to either condone or correct this serious problem. Although CITES, the international treaty controlling wildlife trade, has been in effect since 1976, Mexico has only recently acceded to that treaty and has not yet fully implemented it. Historically, smuggling wildlife into Mexico has been very easy because Mexico did not require the CITES permits which were needed for trade in restricted species in the vast majority of countries.

Until enforceable mechanisms, as required by CITES, are in place to protect birds and other species threatened by wildlife trade, trade in CITES listed species should cease and inspections of shipments and vehicles from Mexico should be multiplied. According to The Washington Post, June 24, 1989, "professional wildlife trafficking rings have made this country [Mexico] a trading center for protected animals from all over the world." This is not one of the markets that should be expanded under NAFTA.

D. VAQUITA/TOTOABA

A Defenders of Wildlife investigation into fisheries practices in Mexico's Gulf of California found that Mexican fishermen were setting gillnets to catch the endangered totoaba fish, in violation of Mexican and international law, and simultaneously incidentally killing the highly endangered vaquita porpoise. The fishery is driven, in part, by unknowing or uncaring fish-consuming American citizens and continues to date. Defenders' petition to the U.S. National Marine Fisheries Service (NMFS) asks that fish mistaken for totoaba enter the U.S. whole, rather than in filet form; it is attached to this testimony.

E. SEA TURTLES/SHRIMP/OTHER FISHERY PROBLEMS

Despite promises to the contrary, Mexico has not secured the use of TEDs on Mexican shrimp vessels. In fact, some evidence suggests that some interests within the Mexican government are working harder to prove that TEDs do not work in Mexican waters than trying to use them successfully. Significant amounts of sea turtle eggs, sea turtle boots, and hawksbill shell trinkets are openly offered for sale in Mexican markets. Two important nesting beaches for endangered sea turtles in the state of Quintana Roo, which had been promised protection, have been sold to European developers for hotel sites. In 1992, important sea turtle nesting beaches were left unguarded as result of federal government restructuring, which leaves authority in SEPESCA, the Mexican fisheries agency that possesses a problematic reputation. The recent rape and torture of two women sea turtle biologists in the state of Chiapas only reinforces the brutal enforcement problems in this area.

Many conservation groups have also voiced strong concern over the continued Mexican fishery for bluefin tuna in that species' breeding area, the Gulf of Mexico. Mexican membership in ICCAT should be given serious consideration in the NAFTA environmental protocol.

V. PUBLIC PARTICIPATION IN NAFTA NEGOTIATIONS AND NAFTA IMPLEMENTATION

A historic premise in international trade, certainly not shared by most environmental policy makers or the U.S. governmental system, is the closed and secretive nature of negotiations and dispute settlements in trade agreements. Consequently, the environmental community, as well as this Congress, has been frustrated by the lack of openness or

"transparency" surrounding trade agreements. President Clinton has asserted that NAFTA must "give citizens the right to challenge objectionable environmental practices by the Mexicans or Canadians."

One relatively simple solution to open trade agreement negotiations would be to expand the Advisory Committee on Trade Policy and Negotiations (ACTPN), though Ambassador Kantor and his staff have thus far provided good access to the NAFTA process. In his bid to win fast-track authorization for NAFTA, President Bush invited environmental representatives to participate in the services, investment, industry, and agriculture advisory committees; these committees helped shape some of the policy of Bush's NAFTA. The problem, however, is that only four environmental representatives were picked, and these four representatives could not sit on other advisory committees, like automobiles, energy, land transportation, and intellectual property rights. Incredibly, there also was no solely "environmental" advisory committee at all for the NAFTA negotiations. The present advisory process, starting immediately with the negotiations of the proposed NAFTA environmental protocol(s), needs to be radically reformed.

Another avenue by which to open trade negotiations and the substance of the agreement is the National Environmental Policy Act (NEPA). NEPA could be presently read to require preparation of environmental impact statements (EISs) for trade agreements like NAFTA. In Public Citizen et al. v. USTR (1992), the U.S. District Court for the District of Columbia found that Public Citizen did not possess legal standing to sue USTR because there had not yet been any "particular agency action that was the source of (the) injuries" under Section 4332(2) of NEPA. This decision revisits the standing difficulties associated with enforcing procedural statutory requirements upon executive agencies under the present Supreme Court. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992), and Lujan v. National Wildlife Fed., 110 S.Ct. 3177 (1990). Senator Metzenbaum has introduced a bill to address some of these standing problems.

Public Citizen appealed the district court ruling denying it standing. But after the President notified Congress on September 18 of his intention to enter into an agreement, Public Citizen filed a motion for summary judgement back in district court, arguing that the now tangible NAFTA was a major federal action "because it is a substantial undertaking of the federal government that will create U.S. international legal obligations, foreclose domestic actions that violate its terms, and establish a North American trading block." Fast track authority increases the executive branch's power to negotiate international trade agreements, but in return it requires the President to meet certain notification mandates. Trade Act of 1974, as amended, 19 U.S.C. Sections 2101, 2111-2112, 2191; Omnibus Trade and

Competitiveness Act of 1988, 19 U.S.C. Sections 2902-2903. Because the President is required under fast track to notify Congress of his intention to enter into an agreement at least 90 calendar days before presidential signature, and subsequently releases the agreement negotiated by USTR itself to Congress, the agreement should at least be deemed to be a "particular agency action" as soon as the 90 day clock begins. 19 U.S.C. Section 2903(a) (1) (A).

Present CEQ regulations state that EISs are required on actions that "establish a precedent for future actions with significant effects or represent() a decision in principle about a future consideration," or that "threaten() a violation of federal, state, or local law or requirements imposed for the protection of the environment," particularly when such effects are "likely to be highly controversial." 40 C.F.R. Sections 1508.27(b)(6), (10), (4). Furthermore, CEQ regulations stipulate that "treaties and international conventions or agreements" are federal actions subject to the EIS requirement and that "proposals for legislation include request for ratification of treaties." Id. Sections 1508.17, 18(b)(1). The State Department, for instance, explicitly acknowledges its duty to prepare EISs for international treaties and negotiations, 22 C.F.R. Sections 161.5(d), 161.7(d)(2), and regularly prepares such EISs. USTR is the federal agency responsible for negotiating international trade agreements; as such, it should prepare an EIS assessing the environmental impacts of NAFTA because the agreement will significantly affect the quality of the environment.

To fully effectuate public involvement in NAFTA's implementation, the agreement's present dispute process needs to be modified. NAFTA's Free Trade Commission, created under the present text, appoints a panel of trade experts to make decisions on disputes between the parties. Not only are NAFTA dispute panels completely closed to the public, but the parties to NAFTA possess the authority to prohibit citizens from final review of panel decisions. NAFTA, Articles 2016, 2017(4). Yet, while environmental and other interests are presently prevented from participating in the dispute process, potential investors and owners of intellectual property enjoy significant dispute participation rights under the agreement.

VI. DETAILS OF THE NAFTA ENVIRONMENTAL PROTOCOL: POSSIBILITIES UNDER THE CLINTON APPROACH

A. NORTH AMERICAN COMMISSION ON THE ENVIRONMENT (NACE)

As several members of this Congress and non-governmental

organizations (NGO) of all three countries have already publicly proposed, NACE must possess enforcement and public participation powers. President Clinton's statements about NAFTA and NACE strongly support this sentiment. The question now, therefore, is what type of enforcement and how much citizen input is necessary for an effective NACE.

The NACE proposed by Defenders, CIEL, and others would give the tri-lateral NACE investigative, monitoring, enforcement and dispute settlement powers. Each party to NAFTA would name a NACE Commissioner and the NACE itself would possess a Secretariat, and the head of the Secretariat would rotate among NAFTA parties. Most public participation would occur through a NACE public advisory committee, though citizens with standing could lodge a complaint directly to the Commissioners and Secretariat directly in some instances.

Again, trade injuries under NAFTA caused by lax environmental enforcement would be remedied by trade measures, such as tariff snap-backs. Environmental injuries caused by NAFTA-related environmental damage would be subject to fines. All money generated by NACE enforcement mechanisms would be used for correcting the environmental problem in question. Neither NACE nor NAFTA should preclude citizens from pursuing existing legal remedies in domestic or international fora. Implementing legislation, in fact, should provide such remedies.

B. OTHER CRUCIAL ELEMENTS NECESSARY FOR A SUCCESSFUL NAFTA ENVIRONMENTAL PROTOCOL

While recognizing President Clinton's desire not to renegotiate the present NAFTA text, we seek a NAFTA environmental protocol that addresses omissions and ambiguities in the Bush NAFTA. These problems include clean-up of the border region, funding, production/ process (PPM) standards (e.g, tuna/dolphin), product and other consumer/labor standards, investment in Mexico, international environmental agreements, energy, agriculture, government procurement, impact on state and local laws, and incorporation of troubling GATT language in the NAFTA text. All are addressed in the aforementioned letter to Ambassador Kantor, attached to this testimony.

C. LEGISLATION AND ADMINISTRATIVE ACTION TO IMPLEMENT NAFTA IN THE U.S.

After entering into a trade agreement under fast track authority, the President must submit to Congress the agreement, a draft implementing bill written in consultation with Congress, other related legislation, a statement of implementing administrative action, and supporting information. 19 U.S.C.

legislative days after receipt from the President.

Implementing legislation for NAFTA must effectuate the agreement's provisions into U.S. law. Whenever U.S. legislation will be changed by a trade agreement, the President must seek fast track authority if he does not want the agreement or its implementing legislation altered by Congressional action, a condition that the executive branch has claimed, since 1974, necessary in order to negotiate successful trade agreements. See generally Edmund Sim, Fla Int'l L.R. 471 (1990).

Nonetheless, NAFTA's U.S. implementing legislation should ensure U.S. competitiveness by controlling product access to our open markets, whether the product itself is sub-standard or the way in which it is produced is sub-standard. U.S. law is replete with environmentally restrictive trade provisions. See e.g., MMPA, 16 U.S.C. Section 1371; 1989 Commerce and Related Agencies Appropriations Act (shrimp), P.L. 101-62, Section 609; African Elephant Conservation Act, Driftnet Enforcement Act of 1992, Wild Bird Conservation Act of 1992 (P.L. 102-440); Delaney Clause, FFDCa, 21 U.S.C. Sections 348, 360, 376; Lacey Act, 16 U.S.C. Section 3372; Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. Section 1978; Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. Section 1821(e)(2). Congress also has expressly reserved the rights of states to adopt more demanding pesticides standards. FIFRA, 7 U.S.C. Section 136(v). These laws reinforce the authority of the U.S. to completely control access to the lucrative U.S. marketplace.

NAFTA must not diminish in any way the ability of citizens to enforce U.S. statutes by civil action. See e.g., ESA, 16 U.S.C. Section 1540(g)(1)(A); TSCA, 15 U.S.C. Section 2619(a)(1); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Section 1270(a)(1); Clean Water Act, 33 U.S.C. Section 1365(a)(1); Deepwater Port Act of 1974, 33 U.S.C. Section 1515(a)(1); Safe Drinking Water Act, 42 U.S.C. Section 300j-8(a)(1); Noise Control, 42 U.S.C. Section 4911(a)(1); RCRA, 42 U.S.C. Section 6972(a)(1); Clean Air Act, 42 U.S.C. Section 7604(a)(1), (3); CERCLA, 42 U.S.C. Section 9659(a)(1); Outer Continental Shelf Lands Act, 43 U.S.C. Section 1349(a)(1).

U.S. citizens (and governments) must also possess and retain the legal right to seek, under existing or future law, restoration damages for environmental health, consumer, and safety laws. See e.g., Marine Sanctuaries Amendments of 1984, 16 U.S.C. Section 1443; Oil Pollution Act of 1990, CERCLA, 42 U.S.C. Sections 9601 et seq. In addition, individuals' ability to seek domestic personal injury damages must not be diminished by the NAFTA legal structure.

Furthermore, the Omnibus Trade and Competitiveness Act of

1988, 19 U.S.C. Section 2901 et seq., provides constructive examples of green implementing language that would protect American competitiveness. Among its provisions, the 1988 Omnibus Act grants the U.S. authority to enforce U.S. rights under trade agreements and respond to unfair trade practices of foreign governments ("Super 301"), continues the traditional trade remedies of countervailing and anti-dumping duties, and also includes an escape clause. All these trade remedies could and should provide relief for trade injuries caused by unsustainable practices.

Finally, the U.S. President and Congress should also give serious consideration to implementing legislation that would specify that companies domiciled in the U.S. must meet U.S. standards in Mexico, unless Mexican standards are higher. Businesses not meeting this requirement would be subject to penalties that could be redirected to environmental compliance. Because U.S. subsidiaries in Mexico comprise almost 40% of Mexican trade with the U.S., and because the U.S. is Mexico's largest trading partner, the implications for environmentally responsible behavior by U.S. businesses operating in Mexico are tremendous.

VII. CONCLUSION: POLITICS AND ECOLOGY IN NAFTA

The tense politics and high stakes of NAFTA make the agreement highly susceptible to overly broad and potentially untrue assertions by both sides of the debate. Unfortunately, the large number of gray areas in the present text fuels various anxieties. From an environmental standpoint, free trade should be a means to an end and not the end itself. It is in this context that we support President Clinton's desire to negotiate and implement a NAFTA protocol on the environment.

This Subcommittee, this Congress, the President, the Vice President, the agencies, advocacy groups, business interests and the general public all will have much work to perform if a successful protocol is to be established. In order to realize the impressive potential of NAFTA, however, "traditional" rules of international trade must be reformed to fully and completely integrate environmental, conservation, health, and safety concerns.

Trade rules are the reflection of our entire economic life as a global community. We must assure that our actions allow life, in all its diverse forms, to be sustained before we act. We must adopt laws and trading norms that do not encourage destructive, wasteful, or degrading practices. In short, we should walk lightly on the earth.

** Although many individuals have offered ideas and assistance, I would like to specifically thank John Fitzgerald, Director of Wildlife Law at Defenders of Wildlife, and Paul Orbach, an attorney with the Center for International Environmental Law, for their help in preparing this testimony.

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March 4, 1993

The Hon. Mickey Kantor
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20506

Dear Ambassador Kantor:

As we all acknowledged on February 23, 1993, during a meeting with you, a number of environmental, conservation, health, and safety problems remain in the present NAFTA. We, the undersigned, hope that this letter clarifies the position of our groups with respect to the President Clinton's NAFTA package. Successful resolution of these problems would not only promote sustainable hemispheric trade, but would also send a clear message to the Uruguay Round negotiators in Geneva. While all the groups signed to this letter acknowledge the NAFTA problems identified, individual groups reserve the right to offer varying solutions to these problems.

First and foremost, we support the President's call for an "environmental" supplemental agreement that will establish a strong North American Commission on the Environment (NACE). However, such a supplemental agreement must clarify various other provisions of the existing NAFTA. In our opinion, these elements of a supplemental agreement should be in the form of a protocol, legally binding upon any party to NAFTA, and of equal stature to NAFTA. Some groups have drafted protocol language for the NACE and are presently drafting similar language for the protocol's other provisions that will be forwarded to you shortly.

I. ENFORCEMENT:

Trade should not be based on weak enforcement of established standards. Enforcement is a crucial issue. We should not subject U.S. citizens to economic, health, safety, or environmental injury as a result of weak enforcement of standards elsewhere. Nor should our NAFTA partners be harmed by a failure of U.S. enforcement. Sanctions, including both trade and non-trade measures, must be available to ensure compliance. Recognizing that sovereignty concerns exist, we propose that a trilateral mechanism, the North American Commission on the Environment (NACE), as discussed below, be established with sufficient powers to ensure adequate enforcement of existing and future laws.

II. NAFTA'S ENVIRONMENTAL OMISSIONS AND AMBIGUITIES:

We recognize the President's desire not to reopen the NAFTA text. Yet, there are provisions in the present text that are either contradictory or unclear, and work to the detriment of

environmental, conservation, health, and safety protection. The Bush NAFTA also completely fails to address several important concerns. Therefore, the topics listed below are areas where a NAFTA protocol must rectify present NAFTA omissions or ambiguities.

A. ENVIRONMENTAL REMEDIATION:

Despite the fact that the several border agreements between the NAFTA parties have been considered separate from the present NAFTA, we do not believe that NAFTA should go forward until enforceable commitments have been made to clean up the border regions. Estimates for the U.S.-Mexico border clean-up range from \$ 5 to 15 billion. The U.S.-Canada border also suffers from trade induced problems.

B. FUNDING:

A secure source of funding for proper infrastructure development, environmental enforcement, increased investigation, and clean-up for all NAFTA-related environmental programs is vital. Because national appropriations processes do not provide a secure source of funding, we believe that designated funding sources, based on fairness and the "polluter pays" principle, must be developed as a prerequisite to implementation of NAFTA.

Ideas that deserve attention include: a) "snap-back" tariffs applied to sectors with lax enforcement of existing standards; b) a small transaction fee on all goods and services that could be phased out over a specified number of years; c) a directed "green" fee; d) an environmental countervailing duty on economic activity that is environmentally unsustainable or below standard; e) "earmarked" tariffs, which could be phased out during the first 10-15 years of NAFTA; and f) development of a "green investment bank," which could utilize established trust funds to leverage additional money through bond proposals. Regardless of which funding scheme(s) is eventually utilized, we believe it is imperative to channel such funds back into environmental infrastructure improvements, enforcement, border inspection, worker transition programs, certain farmer support programs, and funding of the NACE itself.

C. PUBLIC PARTICIPATION AND TRANSPARENCY

Public accountability of governing bodies is an essential element of environmental protection and democratic governance. Accountability includes the rights of notice, comment, the opportunity to participate, the ability to bring complaints, and access to decision-making processes. For the NAFTA package to address these serious concerns, the process of crafting this protocol must provide public accountability and the protocol itself must ensure accountability in the administration and implementation of the NAFTA package.

The current NAFTA dispute panel provisions completely fail to provide citizens from the NAFTA countries with the means to obtain information from, and participate in, resolution of trade disputes concerning environmental, conservation, health, and safety matters. The protocol must provide the public with participatory rights in whatever forum ultimately resolves trade/environment disputes under NAFTA. Furthermore, the NAFTA package must ensure that the public can participate meaningfully in the remaining negotiations of NAFTA. Prior NAFTA negotiations failed to provide the public with sufficient participatory rights, resulting in the deficiencies outlined in this letter. The upcoming negotiations of the NAFTA supplemental agreements provide an ideal opportunity to, at least in part, rectify NAFTA's failure to embrace democratic principles.

D. INTERNATIONAL AND DOMESTIC PRODUCTION/PROCESS
(PPM) STANDARDS:

Trade law must recognize that how a product is produced is as important as the quality of the product itself. Only by recognizing process-based trade restrictions will governments retain their ability to keep high domestic standards without placing domestic producers at a competitive disadvantage. Although Article XX of the General Agreement on Tariffs and Trade (GATT) provides for health and natural resource conservation exceptions, these provisions have been constricted by recent GATT panel decisions. Without explicit clarification, NAFTA will repeat the mistake of GATT panels and the Dunkel draft by incorporating unacceptable provisions or interpretations of GATT (e.g., Article 103, NAFTA). For example, laws that would restrict the import of products made with CFCs, timber produced in an unsustainable fashion, or the inhumane treatment of animals could be subject to challenge under NAFTA.

The infamous tuna/dolphin dispute highlights the political difficulties that can be involved in a dispute concerning production process issues. In the tuna/dolphin case, a GATT panel held that harvesting methods were not a GATT-legitimate basis for distinguishing between, and placing import restrictions on, dolphin deadly tuna. After considerable political negotiation, Mexico agreed to join the U.S. in a global moratorium on the setting of nets on dolphin and to use the moratorium as a basis for prohibiting imports of dolphin deadly tuna. To date, Mexico and the U.S. have failed to enter into a global moratorium. The failure of such agreement to be effectively implemented serves to underscore the necessity for specific text within the context of the NAFTA package setting forth the right of NAFTA parties to set standards and distinguish between products on the basis of production methods. As part of the NAFTA package, we believe that relevant NAFTA parties should also be required to enter into and enact the global moratorium.

E. STANDARDS

A formal trading relationship between countries with significantly different environmental standards possesses predictable tensions. On the one hand, a country with high standards does not want its environmental quality or economic competitiveness to suffer as a result of weak (or non-existent) standards elsewhere. On the other hand, a country with lower standards does not want its sovereignty infringed upon by other countries. No NAFTA party's environmental, health, or safety standards should be weakened by NAFTA, and the NAFTA package should encourage, rather than inhibit, the ability of any NAFTA party to raise standards. See H.Cong.Res. 246 (Waxman-Gephardt); Trade Act of 1974, as amended, 19 U.S.C. Section 2504. In addition, the protocol must protect the full jurisdictional range of each party's domestic standard setting ability, such as proposals to prevent the export of domestically prohibited or restricted products (e.g., pesticides).

We believe the difficulty in reconciling differences in standards can be resolved in a manner consistent with the fundamental principles of international trade; namely, the test for environmental, conservation, health, and safety standards should be the same as for other NAFTA provisions -- national treatment and nondiscrimination. NAFTA's standards provisions must not provide a mechanism to challenge another country's chosen level of environmental, conservation, health, or safety protection, nor the means chosen to achieve such protection if the means is facially non-discriminatory in intent.

NAFTA's two chapters specifically covering standards, Sanitary and Phytosanitary standards (SPS) and Technical Barriers to Trade (TBT), contain ambiguous and contradictory language, and may be interpreted to encourage harmonization towards generally lower international norms. The current TBT and SPS texts set up numerous committees with broad policy jurisdiction, and establish detailed procedures for "conformity assessment" and other harmonization mechanisms. We believe that standard-setting is a matter for local, state, and national democratic bodies, and should be subject to trade disciplines only when there exists a discriminatory intent. To the extent that such committees and standard-setting procedures will exist in NAFTA, the SPS and TBT texts must be supplemented and clarified to ensure openness, mechanisms for public participation and oversight, and participation of environmental, health, and safety experts.

The protocol must also assure that the role of "science" as a necessary basis for standards-setting is not an absolute prerequisite to the adoption and implementation of standards. Standards based, for instance, on the precautionary principle or on consumer preference must be allowed, so long as their intent is transparent and facially non-discriminatory. Similarly, stan-

dards not based on risk assessment, like referendums and "zero-risk" standards, must not be challengeable by NAFTA. The NAFTA package must also make clear the ability of countries to maintain more than one level of acceptable risk. Further, the role of international standard-setting bodies must be only advisory.

In addition, the NAFTA standards sections threaten to expose legitimate environmental, conservation, health, and safety protections to attack as trade barriers on the basis of how a particular level of protection is implemented. The protocol, therefore, must clarify that a non-discriminatory measure will not be held to violate NAFTA because some less NAFTA-inconsistent measure may conceptually exist, a measure has extrajurisdictional implications, or is based on process distinctions.

Finally, the protections afforded by the wide range of standards applicable in the NAFTA parties can only be as strong as the commitment of the NAFTA countries to effectively monitor, inspect, and enforce these standards. For example, with the increased movement of products expected from NAFTA, the U.S. will need to implement new inspection mechanisms to ensure that meat and livestock imported from Mexico and Canada meet all applicable U.S. standards.

F. IMPACT ON STATE AND LOCAL LAWS:

Because states and localities are not parties to NAFTA, they cannot directly defend their standards under Chapter 7 or 9. Although the federal government is allowed to set standards it deems "appropriate," states and localities do not explicitly possess this right, and are thus dependent upon the federal government for defense. Furthermore, NAFTA Article 105 states all parties "shall ensure that all necessary measures are taken that in order to give effect to the provisions of this agreement ... by state and local governments." This situation will have a chilling effect upon progressive sub-federal legislation that often drives effective federal action. Thus, the NAFTA package must provide sub-federal governments standing and a major role in NAFTA disputes. It must also assure the ability of sub-federal governments to establish initiatives that exceed federal and international standards.

G. INVESTMENT:

Although Article 1114 of the existing NAFTA recognizes "that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," it does nothing to actually prevent such an occurrence. No NAFTA country should become a "pollution haven" for unscrupulous investors, American or otherwise. The United States, for example, frequently applies limitations to investment, domestically and abroad, for important political and national security reasons; that definition must now

be broadened to include ecological security. The NAFTA package must provide a means, including for instance offsetting tariffs to make "polluters pay," so that environmental, health, and safety costs are fully internalized. Moreover, NAFTA's investment provisions should permit access to dispute settlement as a means of preventing environmentally damaging investment.

H. INTERNATIONAL AGREEMENTS:

At present, only three multilateral environmental agreements are given some limited measure of protection under NAFTA: CITES, the Montreal Protocol, and the Basel Convention. The Bush Administration's defense to this limitation was that only these three agreements possess direct trade implications. Not only is this assertion false, but the logic behind the argument is also needlessly narrow. We strongly believe that all NAFTA parties must possess the ability to implement and enforce any international agreement by imposing trade restrictions, if such restrictions are an effective way to secure complete compliance with the agreement in question. Therefore, we believe all present and future international environmental, health, safety, animal welfare or conservation agreements, to which any NAFTA party is a signatory, should be referenced in the protocol and added to Article 104.

I. ENERGY:

Rules of energy trade among NAFTA parties must respond to the pressing ecological imperative of global warming by assuring the stabilization of greenhouse gas emissions and the reduction of CO2 emissions. For both Canada and the U.S., substantial reductions of the energy intensity of these economies is also required. It is critical that the protocol make these goals explicit. As currently written, Chapter 6 of NAFTA and its precursor in the U.S.-Canadian FTA fundamentally undermine these objectives. Particularly problematic are those provisions of NAFTA that provide for proportional access, as well as the subsidization of oil and gas projects.

Thus, the protocol must secure the right of all NAFTA parties to restrict the export of energy and energy resources to abate global climate change and achieve other environmental objectives. The protocol must also protect least-cost energy programs, like subsidies to encourage conservation and renewables, from trade challenges. In addition, the protocol should include specific provisions to encourage the transfer of appropriate energy efficient technology and to ensure that full environmental impact assessments are undertaken for all major energy projects.

J. AGRICULTURE:

NAFTA, as written, threatens the survival of family farmers who have the most experience and potential to be good stewards of the land. If agricultural production is to be put on a sustainable footing, (e.g. decreased production on marginal land and the use of fewer chemicals), then environmental and social costs must be internalized. This will not happen if family farmers have to compete with cheaper imports produced in less sustainable ways.

NAFTA must preserve the capacity to employ supply management as a policy tool to promote sustainability. This capacity has been seriously undermined by NAFTA's tariffication of quantitative import controls, including Section 22 of the Agricultural Adjustment Act and the Meat Import Act. We therefore propose that the tariffication provision be altered through the supplemental agreement to allow for import controls on supply managed crops and to create the possibility for the future supply management of crops not currently in the program.

K. CONSERVATION ISSUES:

The NAFTA package must not allow or encourage natural resources such as water, forests, and the diversity of species to be unsustainably consumed or harmed. If countries are to develop and implement sustainable natural resource management programs, they must possess unfettered authority to regulate resource extraction. Of critical importance is the power to determine whether, and under what terms, a NAFTA party's resources may be exploited for export markets. Under NAFTA, particularly Articles 309 and 316, the sovereignty of countries to regulate the export of natural resources is severely curtailed. In fact, Article 316 goes much further than GATT by assuring perpetual access to other party's resources, notwithstanding domestic shortages, for as long as those resources last. A particularly serious problem in this regard is the prospect that NAFTA could be used to compel major interbasin transfers of water despite existing water management regimes. The protocol, thus, must explicitly provide that all parties possess unfettered authority to embargo natural resource exports for legitimate conservation ends.

A related problem centers upon the impact of NAFTA's intellectual property framework on efforts to protect the biological diversity of this continent's ecosystems. The protocol should ensure that equal protection be afforded to both the "stewards" or "owners" of biological resources, including indigenous and minority peoples, as well as to patent holders.

To help deal with wildlife habitat conservation in particular, we propose that the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere be revitalized and specifically linked to NAFTA so that acceding countries to

NAFTA make specific accommodations to habitat protection within their borders.

L. GOVERNMENT PROCUREMENT:

The use of preferential purchasing policies is an important tool that has been used by governments at all levels to create markets for, and encourage the development of, green technology and environmentally sound products. Under Chapter 10 of NAFTA, such green procurement initiatives are vulnerable to challenge. For instance, under the CUSFTA, Canadian paper manufacturers have argued they possess a trade claim on the basis of recycled paper content requirements by U.S. governments. Thus, the protocol must assure the rights of governments to implement environmental purchasing policies and practices free from the threat of trade sanctions.

M. THE "NECESSARY" TEST AND OTHER PROBLEMATIC NAFTA LANGUAGE:

Like many other NAFTA provisions, Chapter 21's environmental "exceptions" incorporate GATT terminology and jurisprudence. Unfortunately, recent GATT panel decisions have interpreted the term "necessary" to protect human, animal or plant life or health" as requiring "necessary" measures to be "least-GATT" or "least-trade" restrictive. Under this standard, many present federal and state measures could be found to be NAFTA-inconsistent -- from bans on the trade in elephant ivory to state recycling programs. The environmental exceptions in NAFTA, therefore, need to be clarified and strengthened to ensure that the GATT jurisprudence does not affect the interpretation of NAFTA.

Also potentially problematic is NAFTA Article 903, which could be read to incorporate GATT provisions and jurisprudence in a way that diminishes a NAFTA country's ability to protect environmental resources. Furthermore, Annex 2004's allowance to seek dispute settlement if a party feels "any benefit it could reasonably have expected to accrue it ... is being nullified or impaired" invites attack upon U.S. standards. Similarly, the "based on" language of Articles 754, 755, 757, and 905 could needlessly threatens U.S. laws like the Delaney clauses. Here again, a clarifying standard should be adopted in the protocol that protects all U.S. environmental, health, and safety standards, as long as they are not arbitrary, discriminatory, or disguised trade barriers.

N. SUSTAINABLE DEVELOPMENT:

While we laud the goal of "sustainable development" in NAFTA's preamble, we would like to see the goal of sustainable development made binding, and appear in Article 102's Objectives. By truly integrating the concept of sustainability into this

protocol, the NAFTA parties will establish an environmental benchmark for hemispheric trade and development.

III. THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT (NACE):

We support a NACE that will possess investigative, monitoring, and enforcement powers for all present and future parties of NAFTA, as well as serve as a mechanism for meaningful public participation. A strong NACE would not only enable the NAFTA parties to jointly increase the use and implementation of beneficial environmental, health, and safety measures, but also provide an effective mechanism for identifying and addressing degrading activities that create unfair competitive advantages or result in trade distortions. All activities of the NACE described will be public, except where explicitly provided otherwise.

STRUCTURE OF THE NACE:

Following are some practical recommendations regarding the structure and functions of the NACE.

1. NACE Commission:

The Commission should ultimately be responsible for all functions of the NACE. Each NAFTA party should have the right to appoint one NACE Commissioner who, together with the other NACE Commissioners, will possess authority to effectively implement NACE policies and perform NACE functions. We suggest that the operative voting norm for NACE be a majority. The U.S. NACE Commissioner, equipped with a staff, should be selected by the President with Senate confirmation.

2. NACE Secretariat:

A permanent and independent Secretariat should also be created in order to realize NACE's substantial mandate. Thus, we recommend establishing a head of the Secretariat (Secretary General). The Secretary General, with staff, should possess responsibility for implementing the environmental, health and safety provisions of the NAFTA package, though national courts would retain concurrent jurisdiction to enforce standards in their own courts. The Secretariat should also be responsible for submitting an annual public report to the parties on its various duties.

3. Roster of Dispute Panelists:

The Commission should establish a roster of environmental, conservation, health, and safety experts with appropriate trade background for dispute resolution under NACE.

4. NACE Public Advisory Committee:

We suggest a Public Advisory Committee be formed, made up of four representatives from each country and one representative selected by the Secretariat. The four U.S. representatives should be picked by the President, and must include at least two individuals from non-profit environmental, conservation, health, and safety groups.

FUNCTIONS OF THE NACE:

1. Dispute settlement:

An effective NACE must be empowered with the authority to engage in two distinct prongs of dispute resolution:

a. NACE must be able to effectively dismiss complaints that attack laws whose sole purpose is to advance legitimate environmental, health, safety, or conservation laws. The protocol should provide that challenges to laws implicating environmental, health, and safety protections should be referred to the NACE. Where the NACE finds that the sole purpose and effect of a challenged party's measure is to advance a legitimate environmental, health, or safety goal, such a finding shall be referred to the NAFTA dispute process for the dismissal of the complaint. Where the NACE finds that the complained of measure is not in full a legitimate environmental, health, or safety measure, the NAFTA dispute may continue, according the findings of the NACE great deference in making its environmental, health, safety, or conservation determinations on the application of NAFTA's provisions. This process will ensure that legitimate protections are insulated from trade challenges, without compromising the ability of the parties to address NAFTA-inconsistent protectionist trade measures.

b. The NACE dispute settlement procedure should also be the mechanism for NAFTA environmental, health, and safety enforcement. Disputes may be brought by NAFTA parties or the public involving environmental, health, or safety issues before the Commission. The Commission should determine which cases shall be directly referred to a NACE dispute panel. In cases where the Commission declines a matter, the Public Advisory Committee should possess authority to compel the dispute resolution under NACE. The Public Advisory Committee should also possess authority to bring complaints to NACE directly. U.S. implementing legislation must specifically acknowledge the right of U.S. citizens and groups to sue in federal court to invoke trade measures or other appropriate sanctions for violation of U.S. standards. NACE should only enforce a party's own standards.

If a dispute panel verifies a complaint by a party or

individual, then that party or individual should be entitled to pursue the "snap-back" tariff provisions of NAFTA's Chapter 8 through the complainant's domestic trade agency. If a dispute panel determines that a party or individual has suffered an environmental, conservation, health, or safety injury as a result of lax enforcement in another country, yet no trade injury exists, then NACE should possess the authority to levy a fine upon the violating entity. Mechanisms should be developed to enable monies collected through the dispute process to be used for environmental compliance.

2. Investigation:

We believe the NACE must possess authority to investigate environmental, conservation, health, and safety matters in all NAFTA countries. The NACE should be able to commence an investigation on its own initiative or at the request of the Public Advisory Committee, the public, or a NAFTA party.

3. Monitoring:

The Secretariat, in cooperation with the NACE Commissioners, should also possess authority to monitor the condition of the NAFTA parties' general environment. Consequently, the Secretariat should possess the authority to obtain information from the NAFTA parties' government and the general public.

4. NAFTA Amendments and Accession:

Because of the significant impacts that either NAFTA amendments or accession would have upon the environment, the NACE Commission should make recommendations to the parties on these matters. Any new party to the NAFTA should be required to accede to the whole NAFTA package and submit a report to the NACE on its environmental, health, and safety protection schemes, as well as the enforcement of those protections. These reports could be revised by all NAFTA parties at regular intervals thereafter.

5. Cooperative efforts:

We further suggest the NACE promote cooperative efforts among NAFTA parties relating to trade and its environment, health, and safety implications for technology transfer, technical assistance, training, and education programs. Several successful cooperative ventures between NAFTA parties have already commenced. The potential in exporting U.S. technological expertise will not only enhance enforcement efforts in other countries, but will also generate a significant number of American jobs.

We appreciate the opportunity to brief you on these matters and look forward to working with you over the coming months and years. We hope that the protocol outlined in this letter is merely the beginning of a larger process to incorporate sound environmental oversight into the NAFTA process. Please do not hesitate to contact us if you have any questions.

On behalf of:

Defenders of Wildlife
 Center for International Environmental Law (CIEL)
 Friends of the Earth
 Sierra Club
 Public Citizen
 The Humane Society of the United States
 Humane Society International
 Institute for Agriculture and Trade Policy
 Center for Rural Affairs
 National Family Farm Coalition
 Earth Island Institute
 Marine Mammal Fund
 Animal Protection Institute
 Rainforest Action Network
 Whale and Dolphin Conservation Society
 Performing Animal Welfare Society (PAWS)
 The Fund for Animals
 Environmental Investigation Agency
 Environmental Solutions International
 International Primate Protection League
 N.Y. Public Interest Research Group, Inc.
 Community Nutrition Institute
 National Toxics Campaign Fund
 North America Project, World Policy Institute

cc: The Honorable Bruce Babbitt
 The Honorable Carol Browner
 The Honorable Mike Espy
 The Honorable Ron Brown
 The Honorable Warren Christopher
 The Honorable Tim Wirth
 The Honorable George Mitchell
 The Honorable Max Baucus
 The Honorable Daniel Moynihan
 The Honorable John Kerry
 The Honorable John Chafee
 The Honorable John Danforth
 The Honorable Sam Gibbons
 The Honorable Gerry Studds
 The Honorable Richard Gephardt
 The Honorable Dan Rostenkowski
 The Honorable Ron Wyden

The Honorable Bill Richardson
The Honorable Henry Waxman
The Honorable Sam Gejdenson
The Honorable Robert Matsui
The Honorable Peter DeFazio
The Honorable Cardiss Collins
The Honorable John LaFalce
The Honorable Laura Tyson
The Honorable Carmen Suro-Bredie
Ms. Kathleen McGinty

GREENING NAFTA

BY RODGER SCHLICKERSEN

One of the most pressing questions facing the Clinton administration and the new Congress is whether to approve the North American Free Trade Agreement (NAFTA). Because NAFTA would phase out almost all trade barriers between Canada, Mexico and the United States, few decisions have the potential to exert more influence on the economy and environment of this continent. And the pact's tentacles could eventually embrace the entire western hemisphere.

Even environmentalists are not in agreement about the likely impact of this first free trade pact specifically linking developed and developing nations. Defenders shares the concern of critics who believe the current NAFTA draft provides inadequate assurances that the pact would not make Mexico a haven for American industries eager to escape the United States' strict environmental regulations. However, expanded free trade has the potential to break the chains of poverty of millions of people while providing enormous new resources for investment in environmental cleanup and conservation.

As demonstrated by the report in these pages on the remnant of dry tropical forest found in Sonora State, Mexico still has rich natural assets worthy of protection. But without a major improvement in Mexico's economy, it is hard to identify any substantial source of money to finance large-scale conservation.

Defenders thus is taking a position between environmental groups calling

for outright rejection of NAFTA and those endorsing it as proposed. Defenders supports ratification of NAFTA, but only in conjunction with simultaneous approval of a comprehensive environmental side agreement that has the same legal status as NAFTA itself.

What should that environmental side agreement do? First, it must breach the tight secrecy in which the present NAFTA draft proposes to resolve trade disputes.

Second, a secure source of funds must be provided for proper infrastructure development, environmental enforcement and cleanup, especially along the border, where growing industrial activity already has created serious pollution problems. Third, there must be a much more effective deterrent against U.S. industries heading south to escape

our own environmental laws and regulations. Fourth, there must be better international protection for all environmental agreements to which the United States is or will become a party. Fifth, an environmental commission must be created to monitor the environmental effects of the treaty and enforce standards.

The side agreement also must deal with trade restrictions based upon methods of producing goods. As one example, the current NAFTA text does not address the basis of the dispute between the U.S. and Mexico regarding the thousands of Pacific Ocean dolphins that continue to be killed by the Mexican tuna fleet. It is no longer acceptable to maintain that a nation has no right to

impose trade-based conservation standards to protect resources outside its territorial jurisdiction.

If the United States and other leading nations do not look beyond their own borders to advance environmentally sustainable practices, we risk encouraging all trading nations to opt for the lowest common environmental denominator. Such practices undercut our laws and our producers. And if we permit trade-based conservation measures like our hard-won "dolphin-safe tuna" restrictions to be nullified by international trade agreements, we will foolishly deny ourselves a powerful and legitimate bargaining tool on behalf of the environment, namely access to the lucrative U.S. marketplace.

Finally, environmentalists—and especially wildlife conservationists—should ask that ratification of NAFTA be accompanied by revitalization of the all but forgotten 1942 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, designed to protect the wildlife and habitat of 21 signatory countries including the U.S. and Mexico.

In this magazine, Montana Senator Max Baucus, chairman of both the Senate International Trade Subcommittee and the full Senate Environment and Public Works Committee, points out that expanded trade and environmental protection need not conflict. But persuading free-traders and environmentalists to bury past grievances and to replace their old competitive relationship with a new symbiotic one will require real leadership from Congress and the White House. The first step is to negotiate a good NAFTA environmental side agreement. □



FRIENDS OF THE EARTHSM

STANDARDS DOWN, PROFITS UP!

Overview:

This fact sheet explores the issue of whether or not firms relocate in Mexico to escape the costs of U.S. environmental regulation. While acknowledging that such costs are in many cases not as important as the difference in labor costs in a firm's decision to relocate, it appears that once in Mexico (or any other country with either lax environmental standards or lax enforcement) there is a powerful financial incentive to boost profits by not abiding by environmental laws since the cost savings make a huge difference in profits when profit margins are thin. A rough estimation of the gains for some highly regulated industries indicates profits may double.

A) The Concern

The environmental community is concerned that U.S. firms may relocate in Mexico to avoid the stronger pollution control standards and environmental enforcement that exist in the U.S. Firms that relocate are able to minimize pollution abatement costs and can increase profit margins substantially.

There is little doubt that the differences in environmental standards, particularly the enforcement of standards, can be a significant economic factor in a firm's decision to relocate in Mexico. An April, 1991 GAO Report revealed the findings of a survey of wood manufacturers who had relocated from the Los Angeles area to Mexico. Seventy-eight percent of those firms that moved cited stringent pollution control standards as "a major factor in their decision to relocate."¹

B) The Bush Administration's Reply

The Bush Administration repeatedly denied that the costs of complying with U.S. standards are a reason for firms to relocate. Carla Hills, the former U.S. Trade Representative, argued that the compliance costs of environmental laws averages only around two percent for most U.S. industries. Since the costs are small, there is no inducement to move to Mexico. Her argument is based largely on data published in the February 25, 1992 "Review of U.S.-Mexico Environmental Issues."² The argument has been made that currency fluctuations can even be greater than 2%, thus rendering abatement expenditures insignificant.

The Bush Administration also maintained that Mexican environmental laws are tough and that enforcement is "improving dramatically." And, according to the trickle-down theory, economic growth in the country will necessarily lead to improved pollution abatement efforts.

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¹ "Some U.S. Wood Furniture Firms Relocate From Los Angeles Area to Mexico," April 1991, U.S. GAO.

² Review of U.S.-Mexico Environmental Issues, February 1992, see p.164-171

C) The Reality in Mexico

There is overwhelming evidence that foreign firms currently operating in Mexico are guilty of violating Mexico's standards and that these standards are not strictly enforced. According to both SEDESOL (the Mexican environmental agency) and EPA officials, Mexico's environmental program lacks sufficient funds and the adequate staff to ensure that firms comply with Mexico's 1988 national environmental law, the General Law.³

This has led to numerous violations by the Maquiladoras;

- An August, 1992 GAO Report disclosed that none of six new majority owned Maquiladoras studied had undertaken Environmental Impact Assessments, as prescribed by the General Law,⁴
- Over two thirds of the Maquiladora firms have not returned hazardous waste to the U.S., as is required by law, and many foreign firms that produce hazardous waste have failed to register accordingly,⁵
- Independent testing outside Maquiladora firms has revealed toxic pollution levels 20 to 215,000 times in excess of standards for a third of those firms tested.⁶

These violations affect not only Mexican citizens, but U.S. citizens as well, because so many of the Maquiladora firms operate along the common border. The relocation of firms in Mexico is simply increasing output of pollution per unit of production globally.

D) A Possible Explanation For An Apparent Contradiction

It would appear that a contradiction is before us. On the one hand, pollution control costs are relatively minor, on the other hand, U.S. firms operating in Mexico appear to be violating environmental laws with considerable regularity.

A way out of this apparent contradiction follows: Firms may relocate in Mexico primarily for other reasons, especially cheap labor, and then find they can give profits an additional boost by violating environmental standards. In other words, once in Mexico, there is a strong incentive to pollute. The savings associated with noncompliance can be substantial.

The following chart reveals the percentage increase in profit margin that firms can enjoy without having to pay pollution compliance costs. The industries, listed by their Standard Industrial Code (SIC), were chosen from a list of industries highlighted in the February, 1992 "Review of Mexican-U.S. Environmental Issues." This review found that compliance costs did not account for a large percentage of total costs, thus there was no incentive to relocate. However, by not paying for pollution abatement these same industries can dramatically increase their profit margins. Thus, the strong economic incentive to violate environmental laws is created.

³ "Information on Environmental Regulations and Enforcement," May 1991, U.S. GAO.

⁴ "Assessment of Mexico's Environmental Controls for New Companies," August 1992, U.S. GAO.

⁵ "U.S. and Mexican Management of Hazardous Waste From Maquiladoras Hampered by Lack of Information," Nov. 1992, U.S. GAO.

⁶ "Border Trouble: Rivers in Peril," May 1991, National Toxic Campaign Fund.

CHART: THE POTENTIAL PROFIT BOOSTS FROM COMPLETE
NONCOMPLIANCE WITH ENVIRONMENTAL LAWS:

SIC Code:	Industry Name	Return on Sales in percent	Pollution Control as percent of Operating Costs	Profit Boost Gained by Non-compliance in percent
2911	Petroleum Refining	3.2	9.3	281
2874	Phosphorus Fertilizer	4.4	6.7	146
3241	Hydraulic Cement	5	6.1	116
3341	2ndary Nonferrous metals	2.2	6.1	271
3349	Misc. Metal Work	3	5.8	188
2816	Inorganic Pigments	5.6	5.7	96
2865	Cyclic Crudes & Interm.	2.6	5	187
2491	Wood Preserving	2.4	4.9	199
2077	Animal Fat/Oil	1.6	4.8	295
2869	Industrial Organic Chems	5.7	4.7	78
2812	Alkalies and Chlorine	3.2	4.5	136
2833	Medicinals and Botanicals	2.2	4.2	187
3369	Nonferrous Foundries	2.7	4.1	148
2822	Synthetic Rubber	6.7	4.1	57
3312	Blast Furnaces, Steel	3.7	4.1	107
2873	Nitrogenous Fertilizers	1.9	4	207
2819	Industrial Organic Chems	5.2	4	73
2621	Paper Mills	2.9	3.9	131
2631	Paperboard Mills	4.2	3.8	87
3321	G & D Iron Foundries	2.9	3.8	127
2892	Explosives	4.4	3.7	80
Average gain:				160%

(Raw data on Pollution Control as Percentage of Operating Costs from Review of US-Mexico Environmental Issues, February, 1992. Raw Data on Return on Sales from Industry Norms and Key Business Ratios, Dun & Bradstreet, 1991-92. Calculation of gain based on following formula: $X = (((100-R) \cdot P) \div R) \cdot R$ where R = Return on Sales, and P = Pollution Control as Percent of Operating Costs. Chart Compiled by Friends of the Earth)

We realize that the neighboring chart should be read with a certain amount of caution. Return on sales is not a perfect proxy for operating costs. Also, many firms may be undertaking some pollution control and not bypassing it entirely. Therefore the chart presents a true 'worst case'. Finally, returns on sales may fluctuate considerably year to year. Even with these qualifications, the point comes through very clearly that industrial sectors with narrow profit margins and moderate regulatory costs can obtain tremendous boosts in their profits by not undertaking full pollution control measures. If they do nothing to protect the environment, firms in these sectors will likely see their profits more than double.

A possible new pattern becomes apparent. While some firms may find lower environmental costs a reason to move in the first place, many more will be attracted to Mexico by lower labor costs. Once there, however, the temptation to pollute and boost profit margins may be tough to resist.

E) Does the NAFTA Address This Problem?

No. The current text of the North American Free Trade Agreement (NAFTA) fails to offer a cure for the enforcement problem. The closest that the Agreement comes to addressing enforcement is in the investment chapter. This chapter meekly encourages, rather than requires, countries not to lower their standards in order to attract investment. If a situation arises where standards seem to have been lowered to attract investment the Agreement only calls for non-binding 'consultations.' Furthermore, this section applies only to the levels at which standards are set, not to their enforcement.

The Agreement also fails to provide funds for a trinational environmental commission. This commission is needed to tackle environmental problems associated with free trade as they arise. The NAFTA also does not provide for the possibility that disparities may widen if one country passes stricter standards, while the other countries keep their standards at current levels.

The new U.S. President, William Clinton, has endorsed the NAFTA agreement, but spelled out that the trade pact must be accompanied by parallel agreements on enforcement of environmental laws, enforcement of labor laws and the creation of a Trinational Commission on the Environment. Clearly, decisive action in the field of enforcement of environmental laws is needed and should be linked to the NAFTA itself.

Strong parallel agreements in these areas are critical, without them the NAFTA threatens to create in Mexico an even worse 'pollution haven' than already exists today.



Western Hemisphere Convention and NAFTA

There are several sound reasons for directly linking the 1942 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, also known as the Western Hemisphere Convention (WHC), to the ratification of North American Free Trade Agreement (NAFTA):

- ◆ The WHC is geographically tailored to address the wildlife and habitat deficiencies of the NAFTA;
- ◆ The WHC emphasizes the establishment of protected areas (i.e., national parks, national reserves, nature monuments and strict wilderness reserves) and was one of the first treaties to stress habitat conservation as a means of protecting species;
- ◆ The U.S. and Mexico have already signed and ratified the WHC. Although Canada has not ratified the agreement, it is widely believed that it could satisfy the WHC's provisions with relative ease;
- ◆ A total of 21 Western Hemisphere nations, including Brazil and Chile, are party to the WHC. Plans for an expanded NAFTA consist of merging North and South America into a single market by combining the Central American Common Market and the Mercosur trading block countries consisting of Brazil, Argentina, Paraguay, Uruguay, Colombia and Venezuela. Ultimately the hope is to create a Western Hemisphere trading block stretching from Alaska to Patagonia;
- ◆ The scope of the WHC's mandate is extremely clear, stating in a more all-encompassing fashion than other wildlife treaties that species will be protected from "man induced extinction;"
- ◆ Outside of the importance of regional treaties for addressing regional problems, the combined territories of the party nations to the WHC is vital not only because of NAFTA, but also because the Western Hemisphere has one of the richest reservoirs of life on earth – more than 25% of all global species;
- ◆ Linkage with NAFTA is extremely time sensitive. If the NAFTA is to be ratified under current or extended "fast track" authority, it will soon be at the top of the Congressional legislative agenda;
- ◆ One mechanism to link the WHC to the NAFTA can be found under NAFTA Article 104. Basically, this language gives authority for limited preemption if the following international agreements are violated – CITES, the Montreal Protocol and the Basel Convention. It is hoped that the WHC, the Biodiversity Convention, the International Whaling Convention, and additional treaties will also be linked under this provision through the NAFTA environmental supplemental agreement(s).



May 28, 1992

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Manuel Lujan
Secretary of the Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable Barbara Hackman Franklin
Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Ave., N.W.
Washington, DC 20230

Re: Petition by Defenders of Wildlife for promulgation of rules under the Administrative Procedure Act requiring white sea bass from Gulf of California, Mexico, to enter U.S. with heads and tails intact and/or, to list the white sea bass and corvina under "similarity of appearance" provision of the Endangered Species Act.

Dear Secretaries Franklin and Lujan:

Defenders of Wildlife, 1244 Nineteenth Street, NW., Washington, D.C. 20036 (202-659-9510), hereby petitions you pursuant to The Administrative Procedure Act ("APA"), the Endangered Species Act ("ESA"), the Marine Mammal Protection Act ("MMPA"), and the Lacey Act to promulgate regulations which will require bony fish entering the U.S. from the Gulf of California, Mexico region to do so only with heads and tails intact. (APA, 5 U.S.C. Section 553(e)). This rule change is requested in order to further the policy of the ESA to protect the endangered totoaba (*Totoaba macdonaldi*). See 50 C.F.R. Section 17.11. Defenders of Wildlife believes that the most efficient and effective way to deal with the problem is by promulgating import regulations prohibiting the import of fillets and corvinas with heads and tails missing.

As an alternative, Defenders of Wildlife also petitions the Secretary pursuant to the "similarity of appearance" provision in the ESA (16 U.S.C. Section 1533(e)) to list the California white sea bass (Atractoscion nobilis). In addition, we request that the Secretary consider listing the Gulf corvina (Cynoscion othonopterus), the short fin sea bass (Cynoscion parvipinnis), orange mouthed corvina (Cynoscion xanthurus), and the striped corvina (Cynoscion reticulatus) under the ESA.

Section 4(e) of the ESA provides that "[t]he Secretary [of Commerce and Interior] may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this Section if he finds that -

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Chapter."

Of course, if listed under the ESA, the Secretary may by regulation invoke the importation restrictions of Section 9: "It is unlawful for any person subject to the jurisdiction of the United States to...import any such species into, or export any such species into, or export any such species from the United States..." (16 U.S.C. section 1538(a)(1)(A)).

Such a ban on imports is also wholly consistent with the U.S. obligations under the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES). See 16 U.S.C. Sections 1537, 1537A. Under this international agreement, the totoaba (Totoaba macdonaldi) is listed on Appendix I, defined as those species "threatened with extinction which are or may be affected by trade." (CITES, Article II.) International trade in Appendix I species is subject to highly restrictive regulations and only authorized in exceptional circumstances.

Defenders of Wildlife will withdraw the petition for listing under the ESA upon receipt from the National Marine Fisheries Service (NMFS) of confirmation of the intent to proceed with the rule change prohibiting importation into the U.S. of bony fish fillets and corvinas with heads and tails missing.

A. Totoaba Closely Resembles Other Species:

The totoaba is illegally imported into the U.S. It is "endangered" under U.S. law and it is listed on Appendix I of CITES, to which both the U.S. and Mexico are parties. The ports of entry from Mexico are primarily Mexicali, Tijuana, San Luis, and Sonoma. It is through these ports of entry that the totoaba is brought after being beheaded and cut into fillet form, crossing the border through seafood inspection stations disguised as "sea bass," "sea trout," and other types of large fish of the croaker family.

Only in whole form can the totoaba (Totoaba macdonaldi) be distinguished from the white sea bass (Atractosteomus nobilis) and the four species of corvina. If the white sea bass and corvina were required to cross the U.S./Mexican border only in whole fish form, with head, tail, and skin intact, customs and fisheries inspection personnel would be able to distinguish the fish; thereby, prohibiting the endangered totoaba from passing undetected in fillet form allegedly as the white sea bass or corvina.

To clarify morphological differences that will distinguish the totoaba from the white sea bass and other corvina, I refer you to the statement in the Appendix 1 by Dr. Donald A. Thomson, Professor and Curator of Fisheries of the University of Arizona, who has been doing research on the ecology of northern Gulf of California fishes for the past 25 years.

B. Illegal Importation of Totoaba into U.S. Threatens Two Endangered Species:

1) Totoaba:

Totoaba macdonaldi was listed as "Endangered" under the ESA on April 10, 1979. (44 Fed.Reg. 21289.)

Despite the existence of an illegal fishery for totoaba there appears to be only sporadic enforcement of the law (Silber, 1987; Marx, 1988). Totoaba is thought to still reach United States markets, principally in California, disguised as "sea bass" (Silbert, 1987). Once the totoaba has been cleaned and prepared for sale it is difficult for customs inspectors to distinguish the flesh from that of other species [Emphasis Added]... Despite conservation efforts, the totoaba population has continued to decline. After the indefinite closure of the fishery, illegal exploitation apparently has continued ("Endangered Species Status Review Totoaba macdonaldi," June 1991 Administrative Report Southwest Region-91-01, 1991, pp. 5, 6). (Pers. commun., between Irma V. Lagomarsino of NMFS & Sautter, R., April 1991)

"Forty to seventy tons of totoaba are caught per year in the Northern Gulf of California region of Mexico...U.S. trucks go to Mexico to buy totoaba...The Mexican government has done a study indicating that more than twenty restaurants in the San Diego, California, area offer totoaba on menus...most totoaba goes to U.S. markets...Among other things recommended: "Elimination of totoaba fishery, stop export of fish to the U.S...." (Speech by Omar Vidal, Ninth Biennial Conference on the Biology of Marine Mammals, December 5 - 9, 1991, Chicago, Illinois).

Included in Appendix 2 is a 1991 letter from an agency of the U.S. government, the Marine Mammal Commission, to the National Marine Fisheries Service stating the importance of halting the illegal flow of totoaba from Mexico across the Mexican/U.S. border.

Intermittently from early February to late April 1992, Defenders of Wildlife sent a team of investigators to the Northern Gulf of California region of Mexico to investigate and document the totoaba fishery and determine if it was continuing. In spite of a Decree by President Carlos Salinas De Gortari of Mexico imposing a mandatory prison sentence for intentionally killing, capturing or injuring a marine mammal (Diario Oficial, December 30, 1991), and the Mexican Ministry of Fisheries (PESCA) Directive forbidding gill-netting of totoaba in the upper Gulf of California with nets of mesh larger than 10 inches (Diario Oficial, February 13, 1992), the team found large quantities of gill-netted totoaba being sold in markets and out of fishermen's houses. Fish was being sold to American tourists vacationing in Mexico, particularly in recreational vehicle parks. We refer you to Appendix 3 for the affidavit by Project Director Christopher K. Croft.

2) Vaquita:

This petition is also directly relevant to protection of the endangered marine mammal, vaquita (Phocoena sinus), listed as "Endangered" under the ESA on January 9, 1985. (50 Fed.Reg. 1056.) The vaquita is killed primarily in large-mesh gill-nets (15-30.5 cm) targeting totoaba.

"P. sinus is vulnerable to incidental mortality in commercial fishery operations. Historically P. sinus has been taken in the gill-net fishery for totoaba (Totoaba macdonaldi)..." (Norris and Prescott 1961; Robles, Findley, Vidal, Brownell, and Manzanilla 1986; Brownell, Findley, Vidal, Robles and Manzanilla, in press).

"Recent information is summarized by the International Whaling Commission (IWC) (1991). Available information suggests at least 30-40 [vaquita] are taken incidentally each year. The majority of recorded incidental takes were in experimental and illegal nets set for the endangered sciaenid totoaba (Totoaba macdonaldi), which is marketed in the U.S.A. Following depletion of the totoaba the

fishery was closed in 1975 but illegal fishing continues..." ("Dolphins, Porpoises and Whales of the World -- IUCN Red Data Book pp. 106," International Union for the Conservation of Nature 1991.)

"Rigorous sanctions on the importation of totoaba bound for U.S. markets are required..." (G. K. Silbert, "Occurrence and Distribution of the Vaquita *Phocoena Sinus* in the Northern Gulf of California," Fishery Bulletin, U.S. 88:339-346, 1990, pp. 345).

"The vaquita is the most endangered marine cetacean. It is extremely vulnerable to further depletion because it has the most limited distribution of any marine cetacean, its abundance is very low, and it is very strongly impacted by gill-nets. Because of the precarious status of the single population of the species, the Committee recommends that further action be taken to stop the major cause of entanglement by fully enforcing the closure of the totoaba fishery...that immediate action be taken to stop the illegal shipment of totoaba (also an endangered species) across the U.S. border." [Emphasis Added] ("Report of the Scientific Committee," Rep. Int. Whal. Commn 41, 1991, pp. 29).

C. Granting Petition will Facilitate Enforcement of Statute:

This problem should be stopped by issuing a rule change halting importation of fillets and headless/tailless large bony fish from Mexico. In particular, the Mexican border towns that this ruling should pertain to are: Mexicali, Tijuana, San Luis, and Sonoma.

The other option is for the National Marine Fisheries Service to list the white sea bass (*Atractoscion nobilis*) under ESA and consider listing the Gulf corvina (*Cynoscion othonopterus*), the short fin sea bass (*Cynoscion parvipinnis*), orange mouthed corvina (*Cynoscion xanthurus*), and the striped corvina (*Cynoscion reticulatus*). Subsequently, pursuant to permit application under Federal Regulations, the five listed species of fish will be subject to importation from Mexico only in whole form. In this way enforcement personnel would be able to easily identify whether or not the fish is a white sea bass, a corvina, or a totoaba. (50 C.F.R., Sections 13.21, 17.52). Consequently, any and all fillets can be presumed to be totoaba, immediately impounded and sent to laboratories for protein analysis.

D. Embargoes Under MMPA:

The importation of totoaba into the U.S. is in violation of the ESA, MMPA, CITES and the Lacey Act. Considering that this is a critically serious problem for two endangered species, one of which is the world's most endangered porpoise, and considering the problem has persisted for many years in spite of the fact that the totoaba fishery has been illegal in Mexico since 1975, Defenders of

Wildlife views action to prohibit importation of totoaba into the U.S. of the utmost importance. If a rule change forbidding the importation into the U.S. of bony fillets originating from Mexico, or a listing of the white sea bass (*Atractosteion nobilis*) as "threatened" or "endangered" is denied, Defenders of Wildlife will have no choice but to petition the Secretary of the Treasury under the MMPA and APA (16 U.S.C. Section 1371(a)(2); 5 U.S.C. Section 553(e)) to ban U.S. imports of all fish fillets originating in Mexico. See also, Lacey Act, 16 U.S.C. Section 3372.

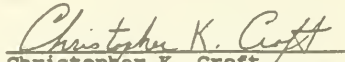
In short, the situation clearly warrants a rule change and/or listings under Section 4(e) of the ESA, and we respectfully ask that you comply.

We appreciate your consideration of this petition, and look forward to your prompt response as called for under 16 U.S.C. section 1533(b)(3)(A).

Sincerely,



Rodger Schlickeisen
President, Defenders of Wildlife



Christopher K. Croft
Marine Mammal Project Director


William Snape
Associate Counsel



June 26, 1992

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The Honorable Manuel Lujan
Secretary of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Barbara Hackman Franklin
Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Ave., NW
Washington, D.C. 20230

Re: Addendum to Defenders of Wildlife's May 28, 1992 petition for requiring rule change that fish from Gulf of California, Mexico enter the U.S. with heads and tails intact and/or, list the white sea bass and corvina under "similarity of appearance" provision of the Endangered Species Act.

Dear Secretaries Franklin and Lujan:

This correspondence serves to clarify two points of law, discussed in the aforementioned petition of May 28, 1992:

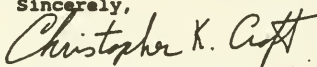
1. You are authorized by the Marine Mammal Protection Act to promulgate a rule requiring that bony fish entering the U.S., from the Gulf of California, Mexico, do so only if heads and tails are intact. 16 U.S.C. Section 1382(a). See also Endangered Species Act, 16 U.S.C. Section 1533(d).

2. Once a species is listed as endangered under the Endangered Species Act, it is immediately illegal to import such a species into the United States. 16 U.S.C. Section 1538(a)(1)(A). See also 50 C.F.R. Sections 17.21, 17.31. No new regulation(s) is necessary to effectuate proper enforcement of this import provision, with regard to totoaba or any other endangered or threatened species.

Defenders of Wildlife requests a meeting to discuss an acceptable solution to the problems which our petition addresses. Please ask the appropriate federal official to contact me at their earliest convenience so that we can set a time.




Thank you for your attention to these matters.

Sincerely,

A handwritten signature in cursive script that reads "Christopher K. Croft". The signature is written in dark ink and is positioned above the printed name.

Christopher K. Croft
Marine Mammal Project Director


THE BATTLE OVER FREE TRADE

Somewhere in the eastern tropical Pacific, a Mexican tuna boat casts its net around hundreds of dolphins cavorting above a shoal of yellowfin tuna. The tuna are later processed and sold to Thailand, France and Italy. The dead and dying dolphins are tossed overboard.  Malaysian loggers clear-cut a tropical forest to create millions of disposable lunch boxes in Japan. The endangered Malaysian elephants living in the forest are captured and hauled to other pockets of shrinking habitat.  A Brazilian steel mill, operating without smokestack scrubbers, undercuts the prices of its foreign competitors who must pay for pollution controls. 

CONSERVATIONISTS HOPE

Its acrid smoke casts a pall over the surrounding countryside. From the television sets we

TO SEE ENVIRONMENTAL

watch to the cars we drive to the grapefruit we eat, international trade serves us all.  More

PROTECTION MADE PART OF

and more, however, it is conflicting with wildlife and habitat protection. Traditionally, con-

PROPOSED GLOBAL AND

servationists and trade professionals have worked in different worlds, focusing on entirely different

MEXICAN AGREEMENTS

concerns. But in recent years their circles have moved closer together.

by WILLIAM J. SNAPE III AND JOEL BOURNE



Copper-smelter runoff at Cananea, Sonora, pollutes the watershed of the San Pedro River, which flows into Arizona. And polluted air blows north.

In 1972 the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed. In 1987 the industrialized nations negotiated the Montreal Protocol that limits trade in ozone-depleting substances. Last May the terms of the Basel Convention came into effect, regulating international trade in hazardous waste. Now these two worlds are colliding like rival big-horn sheep. At issue are two of the most ambitious trade pacts ever: the proposed North American Free Trade Agreement (NAFTA) and the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT).

For conservationists, the trade agreements pose a major dilemma. On one hand, the agreements could promote rapid industrialization of the developing world and unchecked destruction of millions of acres of habitat. On the other hand, if crafted wisely, NAFTA and the Uruguay Round will possess enormous potential for increasing both standards of living and global environmental protection. The outcome depends on how well the disparate worlds of conservation and international commerce integrate their philosophies to create both freer and greener trade.

"The conflicts are more apparent than real," says Sanford E. Gaines, Deputy Assistant U.S. Trade Representative for the Environment. "There are real opportunities and, in fact, some built-in tendencies for trade liberalization and environmental protection to work together toward common objectives."

Perhaps the most volatile environment/trade debate in recent months has been over NAFTA, a 2,000-page agreement negotiated by the Bush administration that would phase out or immediately eliminate most trade barriers in North America, in effect integrating the economies of Canada, Mexico and the U.S. If approved, the agreement will be the first directly linking developed and developing economies and could serve as a model for future agreements between the First and Third Worlds. A bold plan known as the Enterprise for the Americas Initiative would create a massive free-trade bloc stretching from Alaska to Patagonia.

Free-traders contend that NAFTA will

be a boon for all three nations and will light a fire under the sluggish American economy. Even without the agreement, U.S. exports to Mexico are expected to reach \$40 billion this year, representing a staggering 300 percent increase over the last five years. Mexico is now our second-largest market for manufactured goods, surpassing even Japan. Mexico's President Carlos Salinas de Gortari is counting on the agreement to bring much-needed foreign investment into his country and, in time, to turn it into a

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Butterflies drink at a small stream in Coahuila State. A coati searches for ants. Stolen from their nest for the pet trade, young red-crowned parrots await an uncertain future.

manufacturing machine like South Korea or Taiwan.

Conservationists are worried, however, that free trade will have unacceptable environmental costs. Mexico is a veritable fount of biodiversity, home to more plant and animal species than all but three other countries in the world. Roughly 15 percent of its species are found nowhere else on Earth. Yet Mexico

loses about 2 million acres of forest annually, with only 25 percent of its forests still biologically intact. It also shares with the U.S. increasingly pol-



LUPIER RANZI BLAZ

MEXICO IS A FOUNT OF BIODIVERSITY, HOME TO MORE PLANT AND ANIMAL SPECIES THAN ALL BUT THREE OTHER COUNTRIES IN THE WORLD. FIFTEEN PERCENT OF ITS SPECIES ARE FOUND NOWHERE ELSE.



MONTREAL



MONTREAL

luted air and watersheds, including the Rio Grande, which comprises more than half of the U.S.-Mexican border. Mexican farmers still use several pesticides no longer allowed in the U.S., including DDT, and some populations of migratory songbirds that spend time in both countries are in decline.

The Bush administration called NAFTA the "greenest trade agreement ever," and in fact the pact's preamble states that its goal is to promote sustainable development. Yet NAFTA has been criticized harshly by some environmental groups as lacking effective environmental provisions. Conservationists also point out that the 1988 U.S.-Canada free trade agreement may have forced Canada to

lower pesticide standards and to curtail plans to reduce smelter emissions.

For every environmental gain in NAFTA, there seems to be a catch. For example, NAFTA specifically accepts trade measures taken under three international environmental agreements: the Montreal Protocol, the Basel Convention and CITES. But any of the three parties could veto the addition of other environmental agreements to NAFTA, raising the curious prospect of a country signing a new environmental agreement, then rejecting it under NAFTA. Furthermore, measures taken under treaties not named in NAFTA could also be challenged. Such treaties include the new biodiversity convention, several migratory bird treaties and the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.

The agreement does include two important and controversial exceptions—similar to ones found in GATT—that allow trade measures protecting "animal or plant life or health" and "living exhaustible resources." But other articles of NAFTA restrict these exceptions through convoluted and obtuse trade language that can confuse even the well-educated reader. In a classic example of "trade speak," for example, NAFTA Article 316 allows export restrictions to protect exhaustible resources only if "the restriction does not reduce the proportion of the total export shipments of the specific good made available to that other Party relative to the total supply of that good of the Party maintaining the restriction as compared to the proportion prevailing in the most recent 36-month period for which data are available prior to the imposition of the measure, or in such other representative period on which the Parties may agree."

"Imagine trying to negotiate trade

provisions for a global climate protocol within the confines of that!" wrote Washington, D.C., attorney James Losey in his analysis of NAFTA.

Nowhere is the potential impact of NAFTA more apparent, or more frightening to environmentalists, than along the corridor that follows the 1,951-mile U.S.-Mexican border. Here, under a scheme developed during the 1960s, some 2,000 mostly U.S.-owned assembly plants known as maquiladoras operate, producing everything from automobiles and television sets to hand-tied fishing leaders. For the most part they are windowless steel warehouses owned by such U.S. giants as Ford, General Motors and Du Pont. Crowded into neat, fenced-in industrial parks, they stand in stark contrast to the impoverished colonias where many of the workers and those seeking work live in hovels of cardboard and corrugated tin. Designed to spur employment in the region while protecting Mexican industries, the maquiladoras import all their materials from the U.S. and ship finished products back virtually duty-free, taking advantage of cheap labor and in some cases lax enforcement of environmental laws. When the peso crashed in 1982, Mexican labor became among the world's cheapest and the maquiladoras thrived. They now employ about a half-million people and provide Mexico with its second-greatest source of foreign dollars, exceeded only by oil exports.

But the border region was ill-equipped to handle the rapid industrialization and accompanying population growth. As a result, it has grown into one of the most polluted corridors in the world. Few areas have running water or sewage-treatment facilities. Just across the border from El Paso, Texas, for example, Ciudad Juarez pumps 22 million gallons of untreated household and industrial

THE PROBLEM IS NOT LACK OF ENVIRONMENTAL LAWS IN THE BORDER REGION. MEXICO HAS A RELATIVELY FULL COMPLEMENT OF PROTECTIVE STATUTES. THE PROBLEM IS ENFORCING THEM.

waste daily into an 18-mile-long open ditch that skirts the Rio Grande. Matamoras, just south of Brownsville, Texas, and Tijuana add another 27 million gallons of raw sewage to nearby streams every day. Hepatitis and tuberculosis are common on both sides of the border, and the incidence of anencephaly—births of babies without brains—is three times the U.S. average. The American Medical Association has called the border area a "virtual cesspool."

"The main thing we see is that (NAFTA) is part of a plan to move maquiladoras farther south, creating a border pollution zone throughout the country," says Michael Gregory, director of Arizona Toxics Information, a nonprofit group based in Bisbee, about ten miles from the border.

The problem is not lack of environmental laws in the border region. Mexico has a relatively full complement of protective statutes written with guidance from the U.S. Environmental Protection Agency. The problem is enforcing them. Under pressure to clinch the deal on NAFTA, President Salinas has stepped up enforcement efforts on the border, quadrupling the number of environmental inspectors and even temporarily closing a few maquiladoras violating environmental laws. He has also pledged \$460 million to build roads and sewage-treatment plants under a new border plan developed by the two countries.

"It's clear that Mexico has come further over the last couple of years on environmental regulations and enforcement of those regulations than in the previous 20 years," says Geof Land, program manager of the Border Ecology Project, a grassroots group in Naco, Arizona. "But it's difficult to say how effective those steps are going to be because they are primarily politically motivated. You still have cases of com-

panies that are blatantly in noncompliance with existing legislation and still dumping. Really nothing has changed as far as the bottom line goes. Toxics in the water. Air pollution. Pesticide use is virtually out of control."

The Bush administration promised that NAFTA would not create a haven south of the border for dirty industries, even though the proposed agreement

duction and silverware manufacturing. At this level, Chapman suggests, environmental protection costs could significantly affect a company's decision to move south. "In a meeting with the director of environmental planning for a major Mexican industrial city, I was told that there would be no movement to control industrial pollution because industrial production for export to the U.S. was the basis for economic growth," Chapman testified before the U.S. International Trade Commission. "The director noted this comment from a Dutch industrialist: 'I do everything with waste that I couldn't do in the Netherlands. Here I throw it in the sewers and you don't charge me for it.' This is the rule rather than the exception in Mexican industries."

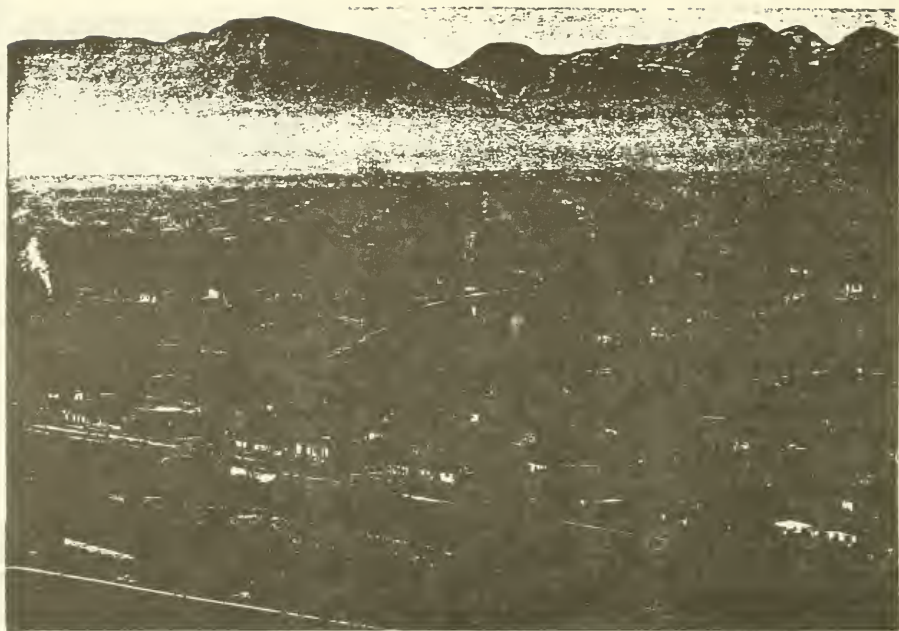


panies that are blatantly in noncompliance with existing legislation and still dumping. Really nothing has changed as far as the bottom line goes. Toxics in the water. Air pollution. Pesticide use is virtually out of control."

Duane Chapman, professor of resource economics at Cornell University, disagrees. In an intensive study of industries in the U.S., Mexico, Chile, Zaire, Zimbabwe and South Africa, he found that pollution control accounted for 14 to 25 percent of overall operating costs in three of the dirtiest industries—automobile manufacturing, copper pro-

duction and silverware manufacturing. At this level, Chapman suggests, environmental protection costs could significantly affect a company's decision to move south. "In a meeting with the director of environmental planning for a major Mexican industrial city, I was told that there would be no movement to control industrial pollution because industrial production for export to the U.S. was the basis for economic growth," Chapman testified before the U.S. International Trade Commission. "The director noted this comment from a Dutch industrialist: 'I do everything with waste that I couldn't do in the Netherlands. Here I throw it in the sewers and you don't charge me for it.' This is the rule rather than the exception in Mexican industries."

During the campaign, President Clinton also called for a triilateral commission to



monitor the environmental effects of NAFTA, a move supported by the environmental community but only if such a body has real clout. "A trilateral commission comprised of nothing more than an intermittent series of ministerial meetings, forced to scramble for a budget, devoid of investigative or enforcement powers, and closed to public participation will do nothing to improve the environment in the member countries," warned Rob Housman and Paul Orbach of the Center for International Environmental Law in a November letter to the State Department.

But even if efforts to green NAFTA succeed, they could be undermined by the latest negotiating round of GATT, the agreement that governs 90 percent of the world's trade. GATT was created

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From El Paso, the first impression of bigger Suarez is polluted air. In Nogales, Sonora, shanties house the workers at one of the maquiladoras along the border.

at the end of World War II in an attempt to help rebuild the devastated economies of Europe and prevent a repetition of the depressions that spurred the rise of Nazi Germany. This complex legal document provides a worldwide system of trade rules, modified by numerous precedents and supplementary agreements, that have been accepted by 108 signatory nations. It also has a governing body based in Geneva that administers the agreement. Today GATT regulations govern trade in some \$54 trillion worth of goods and services annually. NAFTA itself incorporates many elements of GATT by reference.

Despite its length and complexity, GATT is based on a few simple principles. The first is nondiscrimination. Each signatory nation is required to grant

"most-favored-nation" status to all other signatories, meaning that any trade privilege it grants to one must be granted to all signatories. The second principle is reduction of import protection. To this end, GATT seeks to eliminate quantitative restrictions on imports, such as quotas, import bans and other non-tariff restrictions on trade. Tariffs—duties placed on imports—are the only trade protections generally allowed by GATT, though the governing body actively seeks to reduce them. Seven rounds of negotiations over the last 40 years have led to substantial reductions of tariffs, often accomplished by "binding," or setting a maximum level for charges. Tariff reduction has spurred a tenfold increase in world trade since GATT took effect in 1948.

"National treatment" is a third principle of GATT, meaning that any signatory country's taxes and regulations cannot discriminate against imported

goods. "Fair trade" is another GATT principle. It allows countries to use tariffs to offset "dumping" of goods by other countries at below fair market prices.

One of the most important and controversial aspects of both GATT and NAFTA is the process of dispute resolution. Countries that believe they are being denied benefits under GATT by another country can take their complaint to a dispute resolution panel. In a court-like proceeding, a group of three to five trade experts will hear the case, try to negotiate a settlement, and if that fails make a ruling on the dispute. Like most trade proceedings, the meetings are held in utmost secrecy. The panel will then send its decision to GATT's standing council, which must adopt it by consensus. The council allows retaliatory measures if the grievances continue. The recent "chablis war," in which the U.S. threatened a 200 percent increase in tariffs on French wines unless France reduced subsidies on oil seeds, was a classic example of potential GATT-sanctioned retaliation.

If the dispute over agricultural subsidies is resolved, trade experts say the six-year-long negotiations, known as the Uruguay Round, might soon be completed. This possibility is disturbing to many environmentalists and congressional leaders who say the current draft, written by GATT Director General Arthur Dunkel of Switzerland, would severely undermine U.S. environmental laws as well as international environmental agreements. Some conservation groups have even called for a complete revision of GATT, or a "Green Round" of negotiations.

But the conflict between environmentalists and GATT started before the release of the Dunkel draft. It focused on U.S. efforts to stem dolphin deaths in the eastern Pacific ocean. For years, tuna boat captains have set purse seine nets on dolphins that associate with yellowfin tuna, a practice that has killed or maimed more than 7 million dolphins since 1958 and still kills more than 25,000 annually.

To deal with this problem, Congress in 1984 amended the Marine Mammal Protection Act (MMPA) with provisions

authorizing the embargo of tuna from foreign fleets whose dolphin performance was not comparable to that of the U.S. fleet. After this authority was ignored by the Reagan administration, Defenders of Wildlife with other groups in 1988 successfully lobbied Congress for numerical dolphin kill standards—based on the U.S. fleet's performance—which would trigger a tuna embargo if exceeded. The 1988 amendments also authorized a "ban on tuna caught by foreign fleets that kill more than a specified ratio of rare dolphin species.

However, the Bush administration was no more enthusiastic than its predecessor about placing embargoes on viola-



ing countries. In 1990, Earth Island Institute successfully sued for an embargo on tuna from Mexico and other countries that were not complying with the MMPA's standards for dolphin kills. Millions of cans of "dolphin unsafe" tuna bound for the U.S. were barred from entry.

Conservationists celebrated a hard-won victory. But Mexico charged it was an unfair trade barrier and an attempt by the U.S. to extend its jurisdiction into international waters. Despite looming NAFTA negotiations, Mexico

Entangled in tuna netting, a right whale dolphin is hauled in by the crew of a Japanese fishing boat. The U.S. is seeking to protect dolphins.

complained to a GATT dispute panel. It ruled in their favor in August, 1991, sending shock waves through the U.S. environmental community.

At the secret dispute hearings, U.S. trade lawyers argued—some would say not forcefully enough—that the MMPA provisions challenged by Mexico are strictly conservation measures and are allowed under two GATT exemptions. GATT's Articles XX(b) and XX(g), which are partially included in NAFTA, allow trade measures "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources."

The GATT panel interpreted the ex-

emptions as applying only within the jurisdiction of the importing country—meaning within 200 miles of the U.S. coast. Although the decision has not been adopted by the full GATT council, it has sent a powerful and chilling message to those hoping for a greener GATT.

But Steve Chamovitz, a GATT expert and analyst for a federal economic advisory committee, says those who want to restructure GATT face an uphill and perhaps unwinnable battle. He contends that both the tuna-dolphin dispute and GATT's

environmental problems in general can be cured with relatively simple reforms, instead.

"The problems with GATT and the environment are not fundamental, inherent defects in GATT," Chamovitz says. "They are just a series of bad decisions by GATT panels. GATT has eviscerated the Article XX(b) and XX(g) exceptions to the point that there is very little left in them. Consequently, national programs that are perfectly proper and not protectionist can be stymied by GATT."

The crux of the tuna-dolphin issue, as well as the issue of saving tropical rainforests or African elephants, is whether one country can use trade measures to protect wildlife or the environment in other countries or in the global commons (the high seas or the atmosphere). The GATT panel used the term "extrajurisdictional" to describe the Marine Mammal Protection Act. "In principle, it is not possible under GATT's rules to make access to one's own market dependent on the domestic environmental policies or practices of the exporting countries," writes Professor J. N. Bhagwati of Columbia University, an adviser to Director General Dunkel.

But throughout history, many countries, especially economic powers, have used their market power to advance noble causes, such as ending the slave trade and promoting democracy. Should sustainable development be next?

"No question, our laws protect resources outside our borders," Chamovitz says. "I see nothing wrong with that. It's perfectly appropriate. The United States has been doing that for years. Other countries do it. Treaties require it. There is nothing GATT-illegal about it. And there has never been a coherent argument presented as to why it would be." If the panel reports are corrected, he adds, the broad language of Article XX will cover almost any legitimate environmental concern. At present, the Uruguay Round of GATT has not addressed a reformed interpretation of Article XX.

The key concept linking trade and the environment, especially as it relates to trade with developing nations, is sustainability. This term means many things to many people. The United Na-

THE CRUX OF THE TUNA-DOLPHIN ISSUE IS WHETHER ONE COUNTRY CAN USE TRADE MEASURES TO PROTECT WILDLIFE OR THE ENVIRONMENT IN OTHER COUNTRIES OR IN THE GLOBAL COMMONS.

tions Conference on Environment and Development (UNCED) defined as "sustainable" development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." Although conservationists use various definitions, they include sustainable agriculture, forestry and fishing, practices that could provide significant protection of the world's dwindling biological diversity.

A crucial step toward sustainable development advocated by conservationists is the inclusion of environmental costs in a product's market price, a process known as cost internalization or full-cost pricing. When tropical hardwoods are bought from Malaysia, for example, the timber's price would include the lost benefits of the standing forest, such as oxygen production, soil and water retention and biological diversity. At present, no appropriate price adjustment is made for lost forests.

A few industries already internalize some environmental costs by including pollution control expenses in the final prices of their products. But the added cost to a U.S. steel manufacturer, for example, of complying with the Clean Air Act can make its prices higher than those of certain foreign steel manufacturers not subject to such regulation. The U.S. could offset this price disadvantage in two ways: it could place a tariff on foreign products equal to the cost of environmental protection, or it could subsidize U.S. steel mills for the cost difference. "A green tariff would provide funds that could be immediately loaned, at little or no interest, to less-developed producers to upgrade pollution controls or land-management practices," notes John Fitzgerald, Defenders of Wildlife's director of wildlife law.

Unfortunately, GATT precludes both the tariff and subsidy methods of

cost-adjusting because it bans discrimination between like products on the basis of their method of production. Michael Porter, an international trade expert at the Harvard Business School, contends that countries may actually gain a competitive advantage by raising environmental standards. Such standards, he argues, promote technological advances that make environmental protection cheaper. In other words, green subsidies would enable industries to stay competitive while meeting higher standards and becoming more efficient.

But GATT outlaws even short-term adjustment mechanisms—a serious shortcoming of the Dunkel draft, according to prominent Washington attorney Kenneth Berlin. "Earlier drafts permitted environmental subsidies as an exception to regular GATT obligations," Berlin wrote in a recent paper on trade and the environment. "Although exceptions for research and regional aid remain in the Dunkel draft, the exception for specific environmental subsidies was deleted, partially at the insistence of the United States."

This "method of production" distinction was another area where MMPA ran afoul of GATT. To the GATT panel, tuna was tuna, regardless of the way it was caught. "Even though population estimates for two species of dolphins have declined by more than 60 percent as a direct result of the purse seine tuna fishery, the panel's interpretation of GATT does not appear to allow goods from unsustainable production methods to be embargoed by the importing country. At the very least, unsustainable and substandard harvesting processes must be subject to trade sanctions, enforceable by an injured party of the importing country," explains Defenders' Fitzgerald.

Another way trade measures can be used to promote sustainable develop-

CREATING A FRAMEWORK FOR LIBERALIZED TRADE AND SUSTAINABLE DEVELOPMENT WILL REQUIRE BRIDGING THE CHASM BETWEEN THE DEVELOPED NORTH AND DEVELOPING SOUTH.

ment is to limit exports of raw materials and increase the production of finished goods made from those materials within a country. Brazil, for instance, will earn more exporting rosewood guitars than raw rosewood logs. The same is true of rawlog exports from the beleaguered Pacific Northwest. The income generated from this additional processing would take some of the economic pressure off the natural resource, especially in developing countries where there is intense pressure to sell raw materials to raise foreign revenue. Furthermore, economists routinely criticize whole-log exports because they depress the price of whole logs and encourage overcutting to make up for the shortfall in income.

Again, however, GATT establishes a roadblock by generally forbidding such export controls. One of the major criticisms of GATT from developing nations is that it has done little to thwart tariff escalation, the practice of increasing duties as goods become more processed. This system of staggered duties would make it much more expensive for Malaysia, for example, to sell automobile tires to the U.S. than raw rubber. Third World countries have complained that this gives industrial nations cheap access to raw materials in developing countries while discouraging local manufacturing.

Still another way to promote sustainable development in less-developed countries—in a manner consistent with free trade—is through debt-for-nature-swaps, engineered by lender governments as well as private groups. These enterprising arrangements enable developing countries to receive debt relief in return for conservation projects within their borders. Conservation International, a Washington-based nonprofit group, pioneered the first such deal in 1987 with Bolivia, buying part of that coun-

try's national debt in return for a Bolivian commitment to proper management of the Beni Biosphere Reserve in the northeastern corner of the country. About half a dozen such swaps have been completed and more are in the works. The swaps simultaneously ease the economic burdens of developing countries and preserve biodiversity.

Threatened by various unsustainable practices around the globe, particularly in less-developed countries, biological diversity is a crucial barometer of sustainability. And making biodiversity pay could be one way to curtail what Harvard biologist E. O. Wilson calls "the sixth great spasm of extinction"—the possible loss of a fourth of the Earth's living species within the next 50 years if the current pace of habitat destruction continues. Nearly a quarter of all medicinal prescriptions in the U.S. alone are based on plant or microbial products. The anticancer agent vincristine was recently discovered in the Madagascar periwinkle. Hundreds of alkaloids from flowering plants have proved useful as medicinals, yet thus far only about 5,000 of an estimated 250,000 species have been screened for potential uses.

In a purely economic sense, the potential profits from a protected living rainforest could be staggering. Realizing those profits will not always be easy. It takes advanced technology to screen natural substances for medicinal value—technology few developing countries possess. But in a positive step forward, Merck and Company, the world's largest pharmaceutical firm, last year paid Costa Rica's Institute for Biodiversity \$1 million and agreed to pay a royalty on any commercially viable products for the right to do "chemical prospecting" in the Costa Rican rainforest. This endeavor is not without drawbacks. No one knows what a rainforest is worth as

a pharmaceutical source. One trade expert familiar with the Merck deal speculated that Costa Rica may have sold its birthright for a mess of pottage. And what happens after all the species are screened and the useful chemicals have been synthesized? Will the logging trucks then roll in?

Part of the problem of increasing the economic value of biodiversity lies in the U.S. biotechnology industry's reluctance to share technologies or royalties with the developing nations where the building blocks of products are found. In the Uruguay Round of GATT they have insisted on protection of intellec-





tual property rights, such as biotechnology patents, claiming such protection is crucial to the development of biotech products. Industry's position was evident during negotiation of the biodiversity convention approved by most nations in Rio last June. President Bush declined to sign the treaty, arguing it would hurt the U.S. biotechnology industry by not providing adequate protection for intellectual property rights. Developing countries, where most of the world's species exist, counter that

■
A cattle ranch in Tamaulipas State created by slash-and-burn clearing, one of the threats to border wildlife.

they deserve just compensation for keeping their ecosystems intact.

This insistence on the protection, or extension, of intellectual property rights has fueled the growing rift between the First and Third Worlds. "It is costly, particularly to de-

veloping nations, not only to install pollution equipment, but also to protect natural resources and to build the infrastructure necessary to ameliorate the impact of increased development resulting from freer trade," Kenneth Berlin has

pointed out. "The industrial nations will have to bear some of this cost, and it would be advisable for the international community to address this issue directly as was attempted, with relatively little success, at the Rio Summit."

Creating a global framework for liberalized trade and sustainable development will require bridging the chasm between the developed North and developing South. Such countries as Malaysia and India are already skeptical about trade restrictions based on the premise of environmental protection, labeling them "eco-imperialist." Winning the support of developing nations will be crucial. Besides containing most of the world's biodiversity, they are home to 77 percent of the world's human population, a figure projected to rise sharply in the coming years. Yet the average per capita gross national product of countries in the Southern Hemisphere is only six percent of that in the North. "A more equitable distribution of political power, wealth and land is a prerequisite in many of these countries for any successful effort to rescue their environments and societies," wrote Vice President Al Gore in his best-selling book *Earth In the Balance*.

Bridging the gap between environmentalists and free traders should not be as hard. As Malcolm Gillis of Duke University has stated, "The dichotomy that many perceive to have arisen between economics and ecology is false and has persisted primarily because of bad economics." Heeding such advice, Frank Popoff, chairman and chief executive officer of Dow Chemical Corporation, urged his industry last October to move toward full-cost pricing and increased environmental protection as "a matter of economic survival." Perceptive participants in world trade discussions are coming to recognize that like the Hatfields and McCoys who ended their feud in marriage, trade and environmental protection must merge if the world's burgeoning human population is to build a satisfactory foundation for the long future. □

William J. Snape III is associate counsel for Defenders of Wildlife. Joel Bourne is a former associate editor of this magazine.

**ENVIRONMENTAL IMPACT OF THE NAFTA
ON THE U.S.-MEXICO BORDER REGION**

**TESTIMONY BEFORE THE SUBCOMMITTEE ON
ENVIRONMENT AND NATURAL RESOURCES
UNITED STATES CONGRESS**

**KHOSROW FATEMI, DEAN, THE GRADUATE SCHOOL OF
INTERNATIONAL TRADE AND BUSINESS ADMINISTRATION**



LAREDO STATE UNIVERSITY

**ENVIRONMENTAL IMPACT OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
ON THE U.S.-MEXICO BORDER REGION**

INTRODUCTION

For the residents of the region bordering Mexico, the North American Free Trade Agreement (NAFTA) is an issue of great importance and concern.

On the one hand, there are environmental concerns. For the people who live in the region bordering Mexico, the environmental impact of the NAFTA is a real and tangible issue; one which affects the lives of the border residents on a daily basis. After-all, it is they who breath the air and drink the water which may be, and indeed the latter is, highly polluted.

On the other hand, there is the promise of increased economic activity and greater economic development. For a region with a level of economic development more in line with that of developing countries than the world's most prosperous country, this is a great motivation. (For an elaboration of this point and for more statistics on the economic plight of the border, please see Appendix I.)

ENVIRONMENTAL CONCERNS

For the residents of this region, the environmental impact of the NAFTA is one that will significantly affect every aspect of their lives. In transportation, for example, the Port of Laredo handles approximately 30,000 south-bound loaded trailer-trucks every month. This does not include thousands of empty trailer-trucks, nor does it include close to

9,000 smaller trucks and over 500,000 other private vehicles. (For detailed statistical data on cross-border vehicular traffic, please see Appendix II.)

If recent trends continue, all of these numbers will double every five to seven years. The implementation of the NAFTA will most likely accelerate this growth, probably substantially.

The border region is hardly prepared to cope with the environmental impact of this traffic now, and will be less prepared to manage the environmental impact of the expected increase in the traffic which will have to go through different border cities and roads to accommodate the growth.

ECONOMIC CONCERNS

The residents of the border region also have a second, maybe more significant concern, that is the economic status of the region. The cities and counties on the border with Mexico are among the poorest in the country. For example, per capita income in Laredo and many other border communities is less than 50% of the average for the United States.

Furthermore, and more specifically, border towns lack a manufacturing base, they are deficient in economic infrastructure, and generally lack economic diversity needed for sustainable economic growth and development. (For example, despite enormous improvement in recent years, Laredo's economy still suffers from lack of infrastructure; ^{33%}~~26%~~ of its private sector employment is in retailing which is highly susceptible to exogenous variables; and, its manufacturing labor force is

one-fifth of the national average. (For more details, please see Appendix III.)

Given the reality of the situation, for the residents of the region bordering Mexico, striking a reasonable balance between economic considerations and environmental concerns is a necessity, not a luxury. For the region, the NAFTA may bring about such a balance. It may also help the region get out of its economic quagmire. In this context, NAFTA could serve as a blueprint for a promising future.

For the region bordering Mexico, and for the rest of the country for that matter, NAFTA is not a panacea, nor is it a cure-all. In fact, it is well understood that NAFTA will bring about its own problems. Minimally, it will adversely affect some sectors of the region's economy, and will require some structural adjustment on the part of some other sectors. But overall, the North Agreement Free Trade Agreement will benefit the border region and, therefore, it should be ratified and implemented as soon as possible.

CONCLUSIONS

The implementation of the North American Free Trade Agreement will increase economic activity in the region bordering Mexico. In particular, it will expand international trade across the border. Considering the significance of this sector in the region's economy, this could mean more economic activity, and more jobs, in the region. For a region with unemployment rates which have rarely been in single-digits, and are often twice the national average, this depicts a very promising future. (Appendix IV depicts the history of the unemployment picture in the region in comparison with the U.S. average.)

On the other hand, this expanded trade will also translate into increased cross-border transportation, that is more trucks and trains going through the border cities and towns.

A great deal of planning will be required to prepare for this increased transportation and to avoid more traffic jams, more air pollution, more noise pollution, and more water pollution. Additionally, in building more roads and bridges to accommodate this growth it will be very important to be cognizant of their impact on the animal and plant life in the region.

The first step in solving any problem is, of course, understanding the problem. In the case of the environmental hazards of the U.S.-Mexico border region, this point has not yet been reached. The magnitude of the quandary, even in the simple case of the transportation of hazardous materials through the region, is at best only partially known.

Only in recent months ^{have} ~~has~~ serious attempts been made to keep track of the transportation of hazardous and chemical materials through the border. The progress made in this area in recent months notwithstanding, the available information is at best inadequate.

Regardless what else is decided about the environmental impact of the NAFTA, it is strongly recommended that steps be taken to gain an understanding of the problem, and at least measure its magnitude. Until this step is taken, any actions taken to resolve the problem can hardly be effective.

Finally, for the residents of the region bordering Mexico, it is extremely important that a reasonable balance is maintained between the

tangible and basic economic needs of the region and the environmental concerns of its residents. In this context, environmental concerns must be given due consideration. This, however, does not include holding NAFTA's ratification hostage to idealistic environmental goals of external constituencies. Doing so is a detriment to bringing economic development to the region bordering Mexico; and this is a luxury that a region with a per capita income one-half of the national average cannot afford.

Appendix I

COMPARISON OF PER CAPITA INCOME
BORDER REGION, U.S. AND SELECTED LDCs

(In U.S. Dollars)

PER CAPITA INCOME FOR SELECTED
BORDER CITIES IN TEXAS:

Del Rio	\$ 7,631
Laredo	8,973
Brownsville	9,728
Eagle Pass	10,326
El Paso	11,545

PER CAPITA INCOME FOR THE UNITED STATES: \$18,696

PER CAPITA INCOME FOR SELECTED LDCs:

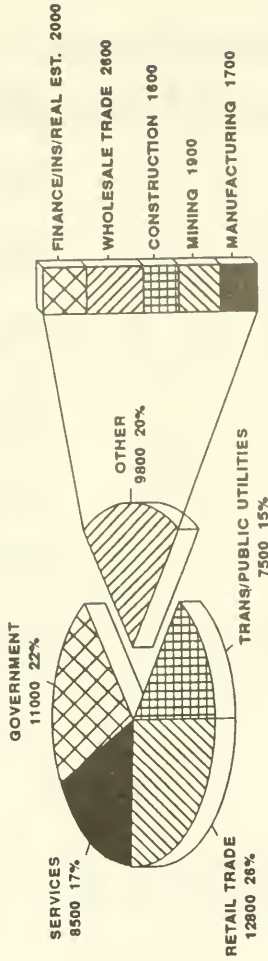
Saudi Arabia	\$ 7,050
Israel	10,920
Singapore	11,160
Hong Kong	11,490
United Arab Emirates	19,840

Sources: U.S. Department of Commerce, Survey of Current Business, Washington, DC: U.S. Government Printing Office, April 1992 and The World Bank, World Development Report 1992, Oxford: Oxford University Press, 1992.

Appendix II: Laredo International Bridges
Southbound Totals, All Highway Bridges

Month	Autos	Pickups	3, 4 & 5 Axle	Total Loaded	2-Axle Unloaded	Small Trailer	3, 4 & 5 Axle, Unloaded	Buses, Thru	Total Vehicles
Jan 91	447,796	4,332	20,105	25,163			14,215	510	512,848
Feb	447,714	4,197	18,515	23,432			12,431	480	507,481
Mar	548,282	4,487	18,687	23,950			15,258	511	611,953
Apr	520,159	5,430	21,879	28,226			14,750	502	591,983
May	541,148	5,216	22,156	28,330			14,399	482	612,683
Jun	533,437	4,919	22,054	27,822			14,585	502	604,178
Jul	538,678	5,385	24,155	30,602			14,780	480	615,138
Aug	540,286	5,898	23,546	30,602			15,904	418	167,814
Sep	495,759	5,434	23,111	29,581			14,845	432	540,422
Oct	516,140	8,444	27,282	34,878			16,364	453	587,483
Nov	505,356	5,637	25,196	31,941	5,563	3,175	9,211	524	555,773
Dec	550,650	6,608	24,248	31,997	7,153	1,564	9,892	520	601,778
Total 91	6,185,403	63,995	270,934	346,524	12,716	4,739	188,424	5,813	6,939,400
Jan 92	468,204	7,028	28,384	33,412	9,198	1,121	12,878	472	523,285
Feb	491,337	6,627	28,729	33,356	9,299	1,330	12,807	530	548,659
Mar	542,165	7,617	29,992	37,609	10,106	1,270	12,811	602	604,365
Apr	530,880	7,483	28,750	36,233	9,979	1,355	12,558	647	591,651
May	556,510	7,164	30,428	37,592	10,438	1,428	12,917	580	619,465
Jun	538,502	8,044	33,450	41,494	10,258	1,338	12,063	530	604,187
Jul	553,097	8,270	32,662	40,932	10,645	1,374	12,528	608	619,184
Aug	569,657	7,280	30,242	37,522	8,891	1,312	11,975	577	629,937
Sep	524,243	7,602	30,821	38,423	9,529	1,199	12,988	550	586,937
Oct	546,722	8,277	33,381	41,668	10,972	1,239	15,705	484	616,800
Nov	514,998	6,808	30,690	37,496	9,795	1,293	13,392	489	577,463
Dec	546,482	8,350	33,314	41,664	9,270	1,568	14,597	644	614,223
Total 92	6,380,797	90,548	366,853	457,401	118,380	15,823	157,017	8,723	7,138,158
Jan 93	512,367	6,836	28,663	35,499	8,550	1,067	15,614	794	573,891

Appendix III: EMPLOYMENT BY INDUSTRY MAJOR CONTRIBUTING SECTORS LAREDO, TEXAS - 1992

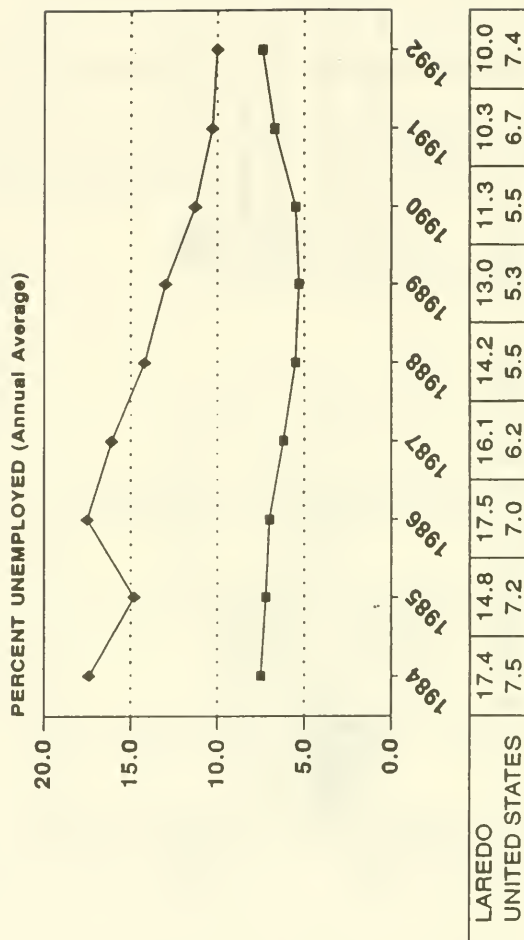


TOTAL WORKFORCE = 49,600

TEXAS CENTER FOR BORDER ECONOMIC & ENTERPRISE DEVELOPMENT

SOURCE: TEXAS EMPLOYMENT COMMISSION

Appendix IV: UNEMPLOYMENT COMPARISON LAREDO/U.S. ANNUAL 1984-92



◆ LAREDO ■ UNITED STATES

TEXAS CENTER FOR BORDER ECONOMIC & ENTERPRISE DEVELOPMENT
LAREDO STATE UNIVERSITY

SOURCE: TEXAS EMPLOYMENT COMMISSION

UNCED UNDERMINED:

Why Free Trade Won't Save the Planet



**Report Prepared by
Greenpeace International**

March 1992

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Executive Summary

The professed goal of the United Nations Conference on Environment and Development (UNCED) is to reorient global thinking, actions, and institutions to the need for environmentally sustainable development. By failing to address the enormous impacts of trade policies on environment and development, UNCED runs the risk of becoming both marginal and irrelevant.

To date, global and regional trade initiatives such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) have failed to effectively address environmental and development concerns. Moreover, it is argued that "freer" trade is all that is needed to increase economic growth and so liberate resources for environmental protection and development. In the past, however, unregulated trade-based growth has led to the overexploitation of natural resources; the transfer of obsolete and dirty industries to Southern* countries, the replacement of domestic food production by environmentally unsound export monoculture, destruction of native and local communities, and the persistent impoverishment of increasing numbers of people in both North and South.

International trade can have both positive and negative effects; Greenpeace is not against trade *per se*. Greenpeace's concern is the lack of attention to the social and environmental consequences of "free trade" and the fact that certain trade rules unnecessarily impede national efforts to protect health and the environment.

Current trade negotiations, by vastly expanding the scope of existing trade disciplines and deregulating the international economy, will make the environmental consequences of trade-led growth even more severe. Among the findings of this report are the following:

(1) By removing restraints to foreign investment, free trade agreements could encourage the movement of dirty industries from North to South. Even UNCED essentially endorses the concept of dirty industry movement by concluding that a higher level of environmental tolerance should be a factor of comparative advantage for the South.

(2) By imposing U.S.-type protection for intellectual property rights such as patents, copyrights, and so-called "trade secrets," free trade agreements will accelerate the transfer of resources, including genetic resources such as seeds and medicinal plants, from South to North, limiting the South's ability to bypass destructive Northern technology. Between \$43 and \$102 billion a year could be transferred from South to North in such royalty payments.

(3) By attempting to harmonize national laws to international standards, especially in the pesticide residue and food safety areas, countries with stricter national legislation could be prohibited from exceeding the international standards. Thus local or national decision-making is sacrificed to an international body (the Codex Alimentarius) that is dominated by agribusiness interests and accountable to no one.

(4) A number of environmental treaties are being negotiated parallel to UNCED. Free trade agreements could undermine these and other international treaties that discourage trade in hazardous products (such as CFCs) and hazardous wastes by limiting the use of import and export restrictions used to ensure environmental protection.

(5) Domestic environmental health and safety measures are automatically suspect and the burden is on the regulating government to defend its actions. Thus free trade agreements could override legitimate national environmental and health safety regulations by striking them down as non-tariff barriers to trade.

"Throughout this report, the use of the "South" or "Southern" is intended to cover all developing, lesser developed, newly industrialized, and Third World countries.

(6) Free trade agreements threaten local and national sovereignty over control of resources and decision-making by dismantling the ability of communities and nations to manage their own rates of resource extraction and by undermining their right to ban the importation of hazardous products and waste, or products made with hazardous or ecologically destructive processes.

(7) Free trade rules ignore legitimate concerns—including concerns expressed in UNCED debates—for transparency, accountability, and citizen participation in decision-making because the public is excluded from any participation in the trade-rules process. Negotiations and dispute-resolution mechanisms remain shielded from public scrutiny and are dominated by private interests.

Greenpeace believes that to truly meet the twin challenges of environmental protection and development, UNCED must tackle trade issues. The Earth Charter and Agenda 21 must both clearly state that international trade is not an end in itself, that trade institutions must be accountable, and that trade must be subordinated to concern for the environment and to authentic, people-centered, socially equitable development. Trade liberalization measures should only be pursued if they do not adversely affect such development. Any treaties concluded as a result of the UNCED process should include consideration of trade issues and should clearly state that their provisions supersede any contrary rules of GATT or other trade agreements.

No ecologically sound future for our planet is possible unless fundamental changes take place in the negotiation and implementation process of trade rules. It should be UNCED's job to challenge the premises and effects of free trade; otherwise it will fail to address the issues of environment and development contained in its name.

UNCED and the New Trade Order

The professed goal of the United Nations Conference on Environment and Development (UNCED) is to reorient global thinking, actions, and institutions to the need for environmentally sustainable development. However, by failing to seriously address the impacts of trade patterns, policies, and institutions on environment and development, the UNCED process risks becoming both marginal and irrelevant. Even more dangerous, fear of violating existing trade regimes* may keep delegates to UNCED from even considering the fundamental economic, environmental, and social changes needed to achieve socially equitable and ecologically sound development.

Greenpeace believes that to truly meet the twin challenges of environment and development, UNCED must tackle trade issues. The delegates to UNCED must assure that new or existing trade institutions and agreements cannot override or sidetrack decisions reached at UNCED. They must reject calls to transform economic liberalization on a global scale into the sole answer to environment and development problems. And they must design new mechanisms or institutions to assure that trade patterns, policies, and institutions support global sustainability or have limited reach where they do not.

The global restructuring of international trade is presently being carried out through the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). The Uruguay Round talks complement the emerging trade liberalization arrangements of regional trading blocs dominated by the European Community and the United States. In the Americas, a proposed North American Free Trade Agreement (NAFTA) between Mexico, the United States, and Canada is being negotiated. NAFTA will be the first step in creating a hemisphere-wide free trade zone under the auspices of the Enterprise for the Americas Initiative. In Europe, trade integration both within the European Community (EC) and between the EC and European Free Trade Association countries continues.(1)

These free trade regimes will complete what the World Bank and International Monetary Fund (IMF) have begun with the policy of

"structural adjustment"—increasing the extraction and export of resources to generate the foreign exchange necessary for debt repayment, reducing governmental control over economic activity, and facilitating the untrammelled and unregulated flow not only of goods, but also of investments and services across national boundaries.

To date, these global and regional trade initiatives have failed to effectively address environmental and development concerns. Instead, they have promoted increased subordination to market forces and transnational corporations at the expense of local self-reliance, sovereignty, democracy, and the biological and cultural diversity necessary for ecologically sound and socially equitable development.

Free Marketeers' False Arguments

International trade can have both positive and negative effects; Greenpeace is not against trade *per se*, rather the concern is with the lack of attention to the social and environmental consequences of unbridled "free" trade, together with certain trade rules that unnecessarily impede national efforts to protect health, resources, and the environment. It is not evident that by simply further liberalizing trade, increased options and greater resources for both environmental protection and development will result. There are three basic points that prove this argument false.

"Unregulated trade-led growth...has led to severe ecological degradation."

First, the historic evidence has shown otherwise. Unregulated, trade-led growth in much of the world has led to overexploitation of land and natural resources, resulting in severe ecological degradation. Monocultural agriculture has caused extensive soil depletion and erosion, pesticide pollution, and human poisoning. Deforestation and desertification are occurring on

*Trade regimes refers to trade agreements and the governance of those agreements.

a massive scale. Industrial growth has led to widespread air, water, and soil pollution, ozone depletion and global warming, along with the creation of a monumental hazardous and solid waste crisis. In addition to the ecological consequences of trade-led growth, local and native communities have been destroyed or displaced and alarming increases in chemical-induced health effects such as cancer, reproductive abnormalities, and immune system suppression have been experienced.

In the South*, these effects have been aggravated by the need to intensify resource exploitation and exports to raise foreign exchange (often to pay back debt) or to counteract low commodity prices that result from declining terms of trade. Clear examples of this process can be seen, for example, in the replacement of indigenous food production systems in Latin America by monoculture export crops like tobacco, sugar, or cotton, which require heavy chemical use, impoverish the soil, and displace small farmers.

The switch to industrial exports has not solved the South's environment and development problems. Rather, it has facilitated the transfer of dirty technologies from the North to the South, reproducing and exacerbating pollution and hazardous production and waste problems worldwide. Export-led growth in the South merely replicates the worst features of Northern industrialization without sustained increases in national or local well-being. Overall, expanding trade has resulted in the impoverishment of our environment as well as a great majority of the world's people who must pay the costs of incorporation into a world market while receiving few benefits.

Second, the very premises underlying calls for further economic liberalization are suspect. Those who hold up free trade as the panacea in UNCED and elsewhere (2) argue it will produce enough growth to free up resources for environmental protection and an end to poverty. But growth does not equal development, nor does it necessarily translate into well-being for either people or the planet. It can lead to unsustainable consumption patterns in which the few use up enormous amounts of energy and resources, while the many are left impoverished. Growth has historically fed private greed at the expense of the public good.

Moreover, the current free trade/growth paradigm is based on encouraging economic ac-

tivity that destroys the resource base but is measured as growth in physical throughput and thus in Gross Domestic Product (GDP). This is followed by increased spending to mitigate or clean up the environmental and health effects of economic activities, which is also, absurdly, counted as growth. If a strategy based on maximizing growth alone has not led to ecologically sound and socially equitable development to date, why should it be expected to in the future?

On the contrary, as trade becomes more globalized and the distance between producers and consumers now stretches across the world instead of across a town or province, the environmental costs are hidden and rise without control—transport and energy costs increase; cultural and biological diversity suffer. More fundamentally, the ecological and social costs of producing goods (except to the extent they are reflected in prices) are not seen or borne by those who live far away, nor are the costs of disposal of what is consumed apparent to producers.

Thus, air or water or soil pollution, or hazardous wastes or runoff from a widget factory or a tomato field are not noticed by the consumers of widgets or tomatoes if they are thousands of miles away from the production site. Because the problems are not visible, there is less pressure to use non-polluting production methods, to ensure environmentally sound packaging and disposal, or to conserve resources for the future. Regulation is less likely, producers become less accountable to the communities in which they operate, and those living in those communities have less say over what is made and how.

Third, current trade negotiations cause concern that the historically destructive effects of unbridled free trade will worsen. The Uruguay Round of GATT, along with regional trade initiatives, promise to result in greater corporate control over local development from afar through the expansion of trade disciplines to services, foreign investment (Trade Related Investment Measures, or TRIMs), and intellectual property (Trade Related Aspects of Intellectual Property Rights, or TRIPs). These initiatives also threaten to impose lowest common denominator global standards for health, safety, and environmental protection.

*Throughout this report, the use of "South" or "Southern" is intended to cover all developing, lesser developed, newly industrialized, and Third World Countries.

New GATT Proposals Exacerbate Problems

International trade rules, as typified by GATT, can have serious environmental consequences in the areas of import and export restrictions, non-tariff barriers, and national treatment of domestic industry. In each case trade rules act to transfer decision-making from public to private actors, with no accountability for the full social and ecological costs of private activities.

Several new proposals in the Uruguay Round related to foreign investment, intellectual property, and harmonization illustrate this trend.

TRIMs and Dirty Industry Movement

In recent years, Southern countries have adopted laws and policies to protect their land and people from being used as dumping grounds for the refuse of industrialized countries. The Bamako Convention banning hazardous waste imports in all but one African country is the best-known example of this welcome trend. Yet these actions to protect the health and dignity of people, and to make waste producers confront the true costs of their activities, are in danger of being undermined by liberalization proposals known as Trade Related Investment Measures (TRIMs).

These liberalized trade rules, proposed in the Uruguay Round and echoed in NAFTA and the Enterprise for the Americas Initiative, directly conflict with ecologically sound and socially equitable development, removing any restrictions on foreign investment. This could result in increased pressure by transnational corporations on countries, especially in the South, to weaken their environmental, worker protection, or consumer safety laws, or enforcement mechanisms in order to facilitate corporate investment.

Such pollution-related movement of transnational corporations has already been noted in the petrochemical, asbestos, waste incineration, and furniture industries.(3) Such movement may take place as some transnational corporations seek to set up production in the South to

avoid being held accountable to pollution control laws in the North.(4)

One argument used by free trade proponents in this arena is that Southern countries have a greater tolerance for pollution because their environment's assimilative capacity is less taxed than those of the North. A recent internal memo written by the World Bank's chief economist Lawrence Summers suggests that the World Bank should "be encouraging more migration of the dirty industries to the LDCs," because, among other reasons, "I've always thought that underpopulated countries in Africa are vastly under-polluted, their air quality is probably vastly inefficiently low compared to Los Angeles or Mexico City. Only the lamentable facts that so much pollution is generated by non-tradeable industries (transport, electrical generation) and that the unit transport costs of solid waste are so high prevent world welfare enhancing trade in air pollution and waste."(5) Alarmingly, even the UNCED Secretariat has fallen prey to this view, concluding (6) that a higher level of environmental tolerance should be a factor of comparative advantage for the South. The logical consequence is that Northern "dirty" industry should be encouraged to relocate in the South, and the South should specialize in resource-intensive or polluting industries.

"Alarmingly, the UNCED Secretariat concludes that a higher level of environmental tolerance should be a factor of comparative advantage for the South, implying that Northern dirty industries should relocate in the South."

Besides recalling the nightmarish descriptions of the "colonies" in George Orwell's book 1984, this view ignores the deficiency of an "assimilative capacity" approach, and wrongly assumes that the environment has an unlimited capacity to receive the vast quantity and variety of industrial waste. While we do not truly know

the capacity of the environment to absorb harmful substances, there is no doubt that substances once thought harmless—like CO₂ emissions, chlorofluorocarbons (CFCs), nuclear materials, or pesticides—now present some of the toughest global environmental challenges.(7)

More importantly, this approach assumes that Southern countries have little choice between unsustainable primary commodity production and polluting industry. It ignores the possibility of developing and supporting local and national economic approaches that can avoid the destructive path of the North.

The assimilative capacity approach further assumes that tolerances for pollution are freely determined by each society, rather than being forced on Southern countries by transnational banks and corporations, multilateral lending institutions, and now free trade agreements, all of which have little regard for community preferences.

How can global environmental problems on UNCED's agenda be solved by increasing pollution in the South? The skewed economic logic that promotes the transfer of dirty industry to the South should have no credibility in the context of UNCED. Rather than encourage the degradation of less polluted areas to an unlivable lowest common denominator, UNCED should seek ways to stop the spread of environmental degradation in both North and South. This involves challenging the development models of the past, not reproducing them. It also requires UNCED to call for free trade agreements that do not remove the right of countries to restrict foreign investment, which could accelerate the movement of dirty industry from North to South.

Technology Transfer and TRIPs

In the current Uruguay round of GATT and in regional negotiations in the Americas, one of the primary goals of Northern countries, led by the U.S., has been to gain increased access to the economies of the South through U.S.-type protection for intellectual property rights such as patents, copyrights, and so called "trade secrets".(8) Such measures threaten to undermine ecologically sound, socially equitable development efforts by requiring that Southern countries pay more for outdated or destructive technologies while reducing the potential for in-

novation. They also ignore the South's contributions to scientific and technological advances.

Negotiations on so-called TRIPs underscore the contradictions between current trade talks and the development objectives of UNCED. While UNCED limits its debates to encouraging a transfer of resources from North to South for development and environmental protection, TRIPs-related royalty payments would amount to a transfer of between \$43 and \$102 billion a year from the South to Northern transnational corporations, in effect more than doubling the current foreign exchange outflow.(9) In addition to this vast resource transfer, current intellectual property proposals can potentially slow technological innovation as large corporations claim ownership of increasing stocks of the world's knowledge and demand payment to release that knowledge. Thus, TRIPs proposals will undermine even the limited view of technology transfer raised to date in UNCED—that the simple transfer of Northern "pollution control" technology to the South will solve environmental problems.(10)

Moreover, by extending patent protection to areas of genetic design and biotechnology, large corporations can reap the benefits of the knowledge of seeds and medicinal plants that farmers and forest-dwellers, especially in the South, have developed over centuries. Southern countries would have to pay royalties to transnational corporations to use seeds and drugs made from genetic materials originally developed and made available in the South. Current TRIPs proposals do not explicitly provide for compensation for discovery and use of these biological and genetic resources, or for indigenous technologies.(11) Once again, trade rules are subject to an unacceptable double standard and essentially rob the South of the genetic resources that have long been viewed as a common heritage.

The only way out of the financial drain, technological impasse, and double standards that TRIPs proposals represent is for producers in the South to reject Northern technology and resource control that has been primarily responsible for environmental degradation and social disintegration to date. A socially and environmentally sound trade system would not facilitate exorbitant prices for patents or rely on a transfer of "pollution-control" technology that will merely create new markets for Northern transnational corporations to enhance their

"green" images and profits. Instead, it would encourage Southern producers to maintain existing appropriate technologies and to avoid current destructive patterns to meet social needs and develop and adopt technology based on clean production, democratic participation, and indigenous knowledge.

Harmonization

Current global trade negotiations include proposals to harmonize countries' national laws in the areas of food health and safety and technical standards. Both the current justification for harmonization and the way it will be carried out give rise to serious concern.

Pesticide residue and food safety standards have received particular attention in harmonization proposals in the area known as sanitary and phytosanitary standards. Proposals in the current GATT negotiations establish the Codex Alimentarius Commission, a Rome-based UN body tied to both the Food and Agriculture Organization and World Health Organization, as the arbitrator of international pesticide residue standards. Codex determines "appropriate" residue levels based on narrow economic risk-benefit analysis and available "scientific" evidence. Countries and regional or local governmental bodies attempting to maintain stricter standards than Codex would find their laws vulnerable to challenge as a violation of GATT.(12) As proposed, such harmonization constitutes a threat to human and environmental health as well as a further loss of community and national sovereignty. As one example, Codex standards would allow higher food residues of DDT and other pesticides long banned in many countries.(13)

While minimum internationally accepted standards would allow many governments to move toward greater protection of the food supply, these proposals mandate an approach to standard setting that creates unacceptable ceilings. Countries choosing to use a precautionary approach to establish stricter food standards, for example, could have their laws declared GATT-illegal for taking regulatory action despite inevitable scientific uncertainty. By not allowing countries to adopt stricter standards, harmonization will slow environmental protection as countries can advance only in lockstep, using narrow scientific and cost-benefit criteria.

Moreover, harmonization as proposed will allow a few unaccountable bureaucrats in Rome to override hard-won local community choices in the name of "science," imposing a "balance" between food safety and economic criteria. But choices about food safety and many other environmental and health issues are neither pure science nor pure economics; they require a social, moral, and cultural judgement about the risk a society is willing to tolerate, about how—or whether—that risk should be weighed against economic considerations, and how those considerations are defined. The international community may be able to impose a minimum level of safety as a protection for human life, but it should not, in the name of free trade, prohibit a society from being more protective of its members. The scientific basis of bodies like Codex is especially suspect because a majority of its technical experts is tied to large agribusiness interests. There are no procedures for ensuring adequate representation by environmental, consumer, and other public interest groups; members are not elected by any representative body; and decision-making is far from transparent.(14)

How Trade Rules Affect The Environment

Trade rules, as typified by GATT, are designed to ensure the fewest possible barriers to trade. Thus, they require that domestic laws treat tariffs or restrictions against a "like" product of one country (or benefits granted one country) the same as those applied to any other country (most-favored-nation or MFN provisions).(15) In addition, domestic and foreign industry must be treated alike with respect to taxes, standards, and other regulations (national treatment provisions).(16) Moreover, even regulations that treat domestic products and imports alike may be challenged as non-tariff barriers if their effect is to favor the domestic industry. Subsidies to domestic industry are discouraged if they increase exports or reduce imports (17), while quotas, bans, or licensing systems on either imports or exports are altogether prohibited.(18)

Under the current interpretation of GATT, countries may not regulate imports or exports to avoid negative environmental effects outside their own territories if, for example, the effects occur in other countries or in the global commons.(19) If disputes arise, then they are settled first by informal consultations (20), and if these fail, by referring the problem to a dispute resolution panel of experts.(21) If the parties to GATT agree that one country's action either violates the rules or otherwise "nullifies or impairs" the benefits another country expected, then they can authorize the aggrieved country to retaliate against imports from the offending country.(22) Regional trade agreements have similar substantive rules.

The net effect of these rules when applied to environmental laws, regulations, or policy creates three fundamental problems:

(1) They diminish a national or local government's ability to regulate private conduct by overriding policy choices made by elected officials and replacing them with narrow private profit-seeking criteria;

(2) They threaten national sovereignty over control of resources and undermine a nation's ability to ban the importation of hazardous products and wastes and products made with hazardous or ecologically destructive processes;

(3) They sacrifice legitimate conservation, environmental protection, and social equity goals.

For all three reasons, these rules should not be applied across the board.

Much talk at UNCED has focused on sustainable use of natural resources. Yet neither GATT nor the regional trade agreements promote sustainable resource use for the benefit of current and future generations.

Trade Patterns, Market Access, and Conservation

Current trade patterns and policies encourage short-term, intensive resource extraction and use. For example, the dismantling of commodity agreements and the decreasing prices for primary commodities force an increase in commodity exports beyond the point where the price received covers the true costs of production. In attempting to diversify their exports into higher value goods, many Southern countries have been discouraged by Northern discriminatory practices of tariff escalation, which, for example, charge little or no tariff on imports

of unprocessed primary products while subjecting processed goods based on the same primary products to higher duties. The classic examples are coffee beans and instant coffee, or raw wood and furniture.(23)

Unilaterally set quotas and restrictions, imposed in areas where Southern countries have been able to establish a competitive advantage—textiles and steel, for instance—reflect the unequal bargaining power of the parties in global trade negotiations.(24) These discriminatory practices are not only unfair; they encourage Southern countries to remain locked into evermore resource-intensive primary commodity production and artificially prop up unsustainable resource use in Northern countries. Such practices, which demonstrate the selective nature of "free" trade, must end.

At the same time, both the South and North must change the nature of what is produced and how. By itself, the South's historic demand for increased access to Northern markets does not automatically lead to improved resource use, conservation, and social equity. An end to tariff escalation, for example, will only lead to sustainable resource use if the production of higher value goods is accompanied by a decrease in pressure on the resource base and by channelling part of the value added into resource conservation measures and clean production. Otherwise, higher earnings will merely lead to expanded resource exploitation and increased dependence on that resource base for jobs and foreign exchange.(25) Increased market access may simply stimulate further unsustainable production of either primary or manufactured goods.

To serve ecological sustainability and social justice, such access must be accompanied by changes in what is produced and who benefits. This transformation cannot be the subject of a new Northern-imposed "green conditionality"—the North has no moral or practical claim to superiority in this area—but a freely assumed commitment by the world's people, North and South.

Prohibitions on Export Restrictions

Trade rules now prohibit export restrictions, making it more difficult for countries to control their own rates of resource extraction. For example, prohibiting the export of raw logs may po-

tentially reduce log extraction and thus deforestation rates. Several countries, including Indonesia, the Philippines, and states in the U.S. Pacific Northwest, have implemented such log export bans to protect domestic forests and industry jobs. These export restrictions have been challenged by Japan and the EEC under GATT rules against quantitative restrictions.(26)

Similarly, the U.S.-Canada Free Trade Agreement requires that Canadian oil and gas companies must be free to export even in times of domestic shortages.(27) Commentators have expressed concern that inclusion of Mexico in a North American Free Trade Agreement would subject Mexico to pressure to likewise guarantee oil exports.(28) Such requirements, by increasing access to cheap fossil fuel supplies, severely undermine attempts at energy conservation and will impede efforts to slow global warming. Along similar lines a U.S. proposal in the Uruguay Round talks of GATT would remove a provision that now allows countries to limit food exports under certain circumstances, reducing national sovereignty over decisions as basic as the food supply.(29) Thus trade agreements can subvert attempts to encourage resource conservation as well as national sovereignty, as governments lose control over corporate behavior even when that behavior affects far more than just private profits.

Import Restrictions And Clean Production

The limits on use of import restrictions under GATT rules similarly may reduce a country's ability to protect its people and environment or to conserve global resources. Import restrictions, especially bans on certain hazardous products or requirements that products meet certain safety criteria, are important to discourage trade in hazardous products and wastes, to enforce global environmental agreements, and to encourage a switch to appropriate production processes.

Restrictions on Hazardous Wastes and Materials

Until challenged, GATT will allow restrictions on hazardous wastes and materials if domestic production or disposal of the material in question is also banned. But what if there is no domestic production, or if countries wish to limit the overall amount of waste they accept by

discouraging imports? Such prohibitions may violate the national treatment provisions of GATT.

Under current trade rules of the European Community, for example, the banning of hazardous waste imports into a region of Belgium is likely to be deemed illegal, because it violates the principle of free movement of goods. In a case now before the European Court of Justice, between the Wallonia region of Belgium and the European Commission, the advocate general's opinion states that such a restriction would unlawfully discriminate between domestic hazardous wastes and imported hazardous wastes.(30) The implications within Europe are frightening. Under the EEC treaty no country will have the right to reject toxic or nuclear wastes in accordance with their own national waste management plans. From an environmental point of view, if producers can simply ship their waste far away—out of sight, out of mind—there is no incentive to promote the switch to cleaner, non-waste-producing methods. Waste bans not only protect the environment of the importing country, they also force exporting countries to minimize their waste. Such bans should not only be allowed but encouraged.

Import Restrictions to Protect Global Resources

Import restrictions aimed at dangerous products and wastes are one example of the problematic nature of trade rules on imports. A more complex situation arises when countries use import restrictions to discourage socially and environmentally inappropriate methods or inputs or to encourage protection of global resources.

Many environmental problems must be dealt with in the first instance by national laws and policies. However, a growing consensus, which could be fortified through the UNCED process, recognizes that certain problems—those relating to atmosphere, oceans, or biodiversity—cannot be solved without international coordination and cooperation. The actions of one country in these areas have spillover effects on others. Under international law, each country has the responsibility to assure that actions taken within its territory do not harm the environment of other countries.(31) Likewise, countries have the right to legislate and adjudicate actions taken outside their territory that have substantial effects within their territory.(32) Thus a country's domestic laws and practices

may be of legitimate concern to other countries if they affect global resources.

"GATT rules may conflict with provisions of global environmental agreements."

Trade-related measures can play a positive role in fostering cooperation and compliance with multilateral agreements on conservation and environment as well as encouraging action on global environmental problems even in the absence of formal agreement. Greenpeace shares the concern of many nongovernmental groups that current GATT rules may conflict with provisions of global environmental agreements. For example, the Montreal Protocol on Protection of the Ozone Layer (33) encourages widespread participation in part by restricting trade in ozone-destroying chlorofluorocarbons (CFCs) and CFC products between parties and non-parties. Under GATT rules, these provisions would not pass muster. Rules distinguishing between parties and non-parties violate the most-favored nation provision because they do not apply trade restrictions across the board. Nor would they be valid under an Article XX exception to these rules, even though human health is a major concern of the Protocol. According to a recent GATT dispute panel decision (34), Article XX allows exceptions for products (i.e., CFCs themselves) but not for processes (goods made using CFCs in their production). Nor does it cover health or resource conservation measures aimed at resources outside the restricting state's jurisdiction, like the global atmosphere.

Another Convention that might contradict free trade regimes is the Basel Convention on Hazardous Wastes. The Convention states that "any state has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory." (35) This provision conflicts with the position of the EEC Commission in the Wallonia waste trade case mentioned above, which favors the "free" movement of goods over the right to ban hazardous imports, as well as with general GATT rules on import restrictions.

The potential conflict between trade rules and multilateral environmental and conservation treaties will be even more pronounced during the negotiations to draft treaties on global warming and biodiversity. Any trade-restricting measures included in the treaties to encourage participation, discourage free-riding, or ensure compliance will be subject to challenge as GATT-illegal restrictions on trade. To avoid this problem, trade-based provisions of multilateral agreements must be allowed under trade rules and must supersede contrary provisions in GATT or regional trade treaties. Those treaties negotiated in conjunction with the UNCED process should make this clear.

Import restrictions may also be useful to encourage conservation of global resources even if there has been no formal agreement. However, care is required because, when imposed by Northern countries on the South, unilateral import restrictions aimed solely at changing another country's internal environmental policies run the risk of perpetuating North-South power imbalances and in some cases can create a double standard that is counterproductive. For example, Greenpeace has supported trade sanctions against Japan and Iceland for whaling (even though there has been no formal violation of the International Whaling Commission) because the sanctioning countries have themselves stopped whaling. On the other hand, sanctions against Mexico and other Latin American and Pacific Island nations for violating "comparability" criteria on the number of dolphins killed in tuna nets have been unilaterally imposed by the U.S., while allowing the U.S. tuna fleet to continue to kill thousands of dolphins. Such sanctions impose a hypocritical double standard that has proven counterproductive in convincing fishing nations to join international regulation programs to stop dolphin encirclement.

"While countries must remain free to impose import restrictions where necessary, the North should make sure its own house is in order."

Similarly, conditioning tropical timber imports on "sustainable management plans" approved by Northern governments while the U.S. and EEC continue the rush to destroy their own primary forests again reflect a double standard. While countries must remain free to impose import restrictions where necessary, Northern countries should make sure their own house is also in order. All countries must stop whaling, encirclement of dolphins, and destruction of their remaining primary forests. Southern countries should receive targeted financial help to allow them to do so.

In addition to carefully crafted use of import restrictions against countries, communities and nations must be able to use import restrictions directly to prohibit products made using hazardous or highly destructive or polluting processes.

Unfortunately, as interpreted by the recent GATT dispute resolution panel decision on tuna imports⁽³⁶⁾, distinctions among products with the same end use on the basis of how they are produced are impermissible under GATT as a basis for restricting imports. Thus tuna caught "on dolphin" is considered the same product as tuna caught using less destructive fishing methods. Likewise, electronic chips produced using CFC-based solvents are "like products" compared with chips produced using water as a solvent, even though the environmental implications of the differing production processes are substantial.

But without differentiation of products by production methods as well as by end use, it is impossible to provide incentives to promote clean, environmentally sensitive extraction or production processes. It is increasingly apparent that the most viable approach to avoiding environmental degradation is precisely a shift to emphasizing changes in production methods rather than after-the-fact palliatives.⁽³⁷⁾

Trade regimes should allow for differentiation of products based on production processes with well-defined and widely recognized differential impacts on the environment. Producers, especially in Southern countries, should obtain incentives for creating or switching to cleaner or non-destructive technologies and methods; such incentives could include preferential market access. Conversely, once a given technology or production process is proven especially harmful to the environment, producers should be discouraged from its continued use through import restrictions.

The Precautionary Principle And Non-tariff Trade Barriers

The precautionary principle, which recognizes the need for environmental regulation to proceed in the face of inevitable scientific uncertainty, has been considered a guiding principle for possible inclusion in the UNCED Earth Charter.⁽³⁸⁾ The validity of a precautionary approach has been dramatically demonstrated by recent reports showing that ozone depletion rates far surpass those used to set targets for CFC reduction only a few years ago. An integral part of the precautionary principle is that the burden of proof should not be on one concerned with the protection of the environment to demonstrate conclusive harm, but rather on the prospective polluter to demonstrate no harm—giving the environment and human health the benefit of the doubt. Yet current trade rules reverse this principle and put an impossible burden of proof on legitimate environmental protection measures.

In the context of free trade, environmental, health, and safety measures are automatically suspect as non-tariff barriers that impede trade or viewed as protectionist measures that favor domestic industry. While in some cases suspicions of protection may be justified, trade rules on non-tariff barriers and national treatment can also lead to invalidation of legitimate environmental measures. For example, industry has challenged as a violation of the U.S.-Canada Free Trade Agreement (FTA) Canadian regulations to reduce emissions at lead, copper, and zinc smelters and U.S. rules on newsprint recycling.⁽³⁹⁾ In another case, after U.S. forestry interests threatened to bring the issue before a FTA dispute panel, the government of British Columbia decided to forego a planned reforestation effort, avoiding a fight over whether it constituted a subsidy to Canadian lumber exporters.⁽⁴⁰⁾ Danish bottle recycling laws and local Belgian limits on hazardous waste imports have been or are subject to challenge in the European Court of Justice as disguised barriers to trade.⁽⁴¹⁾ The few GATT dispute resolution panel decisions bearing on environmental or health matters disapproved a Canadian regulation on conservation of herring and salmon fish-

eries (42), a Thai law limiting cigarette imports (43), and U.S. laws that taxed oil and chemical feedstocks to pay for hazardous waste cleanup. (44)

Decisions under current trade agreements cannot distinguish between narrow protectionism and legitimate protection. GATT never mentions the environment; the only provision of GATT that might apply to environmental measures is Article XX.(45)

The fundamental problem with Article XX is that it is framed as an exception to the general rules of the agreement, not an affirmative principle. As such, it is narrowly construed. Environmental provisions are considered invalid to begin with and must prove they fit into one of the exceptions. This violates the precautionary principle and must be overturned.(46)

Environmental regulation under GATT is subject to an impossible burden of proof. A health or environmental regulation is "necessary," there must be no less-trade-restrictive alternative measures available, and the regulation must not be "disproportionate" to the goals sought. Regulations to conserve resources must refer to "exhaustible" resources and be "primarily aimed at conservation," which has been interpreted to mean there are no other means to reach the conservation goal—all subjective criteria. In other words, if an expert steeped in trade, not environmental, law can come up with any other conceivable way to reach the same goal, or decides the goal isn't really that important, or that the national lawmakers didn't really have conservation in mind, the environmental regulation is disqualified.

It is true that health or environmental regulations can be used to keep out goods only from certain countries or to protect domestic interests. However, the party challenging the regulation in these cases should be able to prove it was designed for protectionist, not valid environmental purposes. Incidental effects on trade should not be enough to overcome a presumption of validity. UNCED should advocate shifting the burden of proof and making environmental protection, health, consumer and worker safety measures presumptively valid. UNCED should also call for changing the way such decisions are made, so that trade agreements can be brought into line with precautionary principles of environmental protection.

Transparency, Democracy, And The Need For New Institutions

Several delegations to UNCED have stressed the need for public participation in decision-making about the environment and development.(47) Yet despite the rhetoric—including that of UNCED debates—concerning transparency, accountability, and citizen participation in decision-making, trade negotiations and rule-making remain closed-door affairs with little public participation. This lack of transparency contributes to a transfer of power from more accountable local and national bodies to unaccountable international entities.

Negotiations for new trade agreements are carried out in secret: in GATT, public and nongovernmental organization's representatives have no access, deliberations are not publicly documented, and even representatives from smaller countries are excluded as deals are cut informally between major trading nations and then presented as "fait accompli."

In the proposed North American Free Trade Agreement, environment and social concerns raised by nongovernmental organizations and social movements have been shunted off onto "parallel" tracks so as not to interfere with secret talks on the "central" issues.(48) The Enterprise for the Americas Initiative similarly relegates environmental concerns to swaps of small amounts of official debt to create "environmental funds," while conditioning such funds on the acceptance of trade and investment liberalization measures with a negative impact on both ecology and social equity.(49)

Dispute-resolution mechanisms also remain shielded from public scrutiny. Under GATT, most disputes are resolved through private consultations between governments. Those that reach the formal dispute-resolution process are decided in secret (50) by arbitrators chosen from the ranks of government delegates to GATT, or occasionally, other experts on trade.(51) Expert opinions on the non-commercial subjects of the dispute, even if clearly beyond the panel members' competence, need be given no weight.

Proposals from the GATT Secretariat would only make existing problems worse. First, a proposed strengthening of the dispute panel process would make the binding force of panel decisions harder to avoid. They would do nothing to increase public access to the process nor limit a panel's ability to rule on issues affecting far more than commercial disputes.⁽⁵²⁾ Second, a proposal to transform GATT into a full-fledged institution known as the Multilateral Trade Organization would increase the power of current trade rules and disciplines. To join, countries would have to accept both the Uruguay Round results, including opening their economy to foreign investment in services and subscribing to TRIPs, and previous GATT Codes and rules: A breach in one area could be retaliated against in another—a refusal to protect "trade secrets," for example, could lead to a loss of export markets in goods.

This proposal inevitably concentrates decision-making power over ever-broader sectors of national economic life in the hands of non-representative trade experts whose mission is to facilitate corporate access around the globe, even at the expense of democracy, the environment, or social equity. It is ironic that Northern countries are willing to back such a far-ranging new institution in the trade arena while they adamantly refuse to consider new institutional arrangements or even a real strengthening of existing environmental agencies within the UNCED process.

Conclusion: Transforming Trade Relations

*"UNCED should challenge
free trade or
admit its own irrelevance."*

No ecologically sustainable future for our planet is possible unless fundamental changes take place in trade policies and in the negotiation and implementation process of trade rules.

It should be UNCED's job to challenge the premises and effects of free trade. Otherwise, it will fail to address the issues of environment and development contained in its name. UNCED must either challenge the existing order or admit its own irrelevance.

It is not enough to pay lip service to the existence of a link between environment, development, and trade. Several current initiatives do just that. For instance, while after much discussion GATT reactivated its long-dormant Working Group on Environmental Measures and International Trade, its initial proposed agenda looks only at how environmental regulations may impact trade, without considering how trade rules may affect the environment.⁽⁵³⁾ It has been left to UNCED to do that. Similarly, proposals to amend GATT simply by adding the word "environment" to the current Article XX exception to GATT rules, or to exempt multilateral treaties through use of a general waiver, will not go far enough so long as social and environmental measures remain merely peripheral and narrowly drawn exceptions to a regime whose basic rules undermine ecological sustainability and social equity.

Greenpeace believes that in reforming trade, the place to start is with a reconceptualization of trade as only one possible tool—not always to be preferred to local self-reliance—to be evaluated on the basis of its contribution to environmentally sustainable and socially equitable development.

UNCED must not ignore the implications of trade patterns, policies, and institutions. The Conference must recognize that free trade is not the answer to current environment and development problems, and that such problems cannot be left merely to the private sector to solve. The Earth Charter and Agenda 21 both must clearly state that international trade is not an end in itself, that trade institutions must be accountable, and that trade must be subordinated to concern for the environment and to authentic, people-centered, socially equitable development.

The following are fundamental changes that must take place:

- Commodity production, export, and use must be reexamined in light of the need for ecologically sound production and social equity. Access for Southern country exports to Northern country markets, an end to Northern policies imposing higher tar-

iffs on processed goods than on raw materials, and stabilization of commodity prices must go hand in hand with incentives for land and resource conservation, non-chemical-intensive agriculture, clean industrial production and forest protection in both the North and South.

- Communities and nations must be able to conserve their own resources through export restrictions aimed at conservation.
- Harmonization proposals must be reformulated to allow for stricter national or local legislation. They must include a broader range of representation on international regulatory bodies like Codex Alimentarius, subject such bodies to public scrutiny, and assure that national or local legislation more protective of health, safety, or the environment are not preempted by less protective international rules, or overturned in the name of a spurious and unattainable "sound science."
- In conformity with the precautionary principle, the burden of proof should be on the party claiming an environmental regulation is an illegitimate trade barrier. Unless the challenging party can prove a merely protectionist intent, regulations of a general character should be presumed valid and not subject to challenge, even if they have incidental effects on commerce. In addition, it should be made clear that such measures include those designed to protect the oceans, atmosphere, or global climate, even if their scope extends beyond national boundaries.
- Import restrictions should be allowed to protect the domestic environment, as part of multilateral efforts to protect the global environment, or to force producers elsewhere to internalize their own costs. Specifically, bans on waste imports or those of other hazardous substances must be allowed. However, care should be taken that such measures do not impose or perpetuate a double standard targeting one country's practices while exempting those of the imposing country.
- Instead, trade rules should discourage resource exploitation and production processes harmful to health and the environment through product-based distinctions applied to all producers. Quantitative restrictions and bans should be allowed for this purpose.
- Any treaties concluded as a result of the UNCED process should include consideration of trade issues and should clearly state that their provisions supersede any contrary rules of GATT or other trade agreements. Moreover, provisions using trade restrictions to encourage participation in existing multilateral environmental protection and conservation treaties must likewise prevail over contrary provisions of GATT or other trade agreements.
- Because trade agreements have profound effects on the environment, they should be subject to prior environmental assessment studies that are open to public input and assessment, and which parties to the negotiations would be expected to take fully into account.
- Trade policy and trade disputes involving broader environmental and social issues should be decided in a transparent, globally representative, publicly accountable forum that includes nongovernmental participation in cases of public concern, where ecological sustainability and social equity, not narrow commercial interests, are the first priority.
- A willingness to accept environmental degradation cannot be considered a factor of comparative advantage. National and international regulation should limit the movement of polluting plants and industries that seek to obtain more lax environmental or safety standards. Countries should be free to limit foreign investment to avoid exacerbating social or environmental problems.

NOTES

1. European Free Trade Alliance countries are currently: Austria, Finland, Iceland, Norway, Sweden, Switzerland, Liechtenstein.

2. A forthcoming report from the GATT Secretariat, for example, argues that the higher per capita incomes resulting from increased world trade would create "the freedom and incentive to devote a growing proportion of national expenditure to the environment." See *Trade and the Environment*, published by the GATT Secretariat; GATT/1529, 12 February 1992.

3. See Walter, I. "International Repercussions of Environmental Policy: An Economist's Perspective." In *Environment and Trade*, edited by Rubin and Graham. (Published under the auspices of the American Society of International Law, Allenheld, Osmun Publishers) 1983, p. 41-42. See also Draft Review of U.S.-Mexico Environmental Issues Prepared by an Interagency Task Force Coordinated by the Office of the United States Trade Representative, October 1991.

4. See Draft Review of U.S.- Mexico Environmental Issues, op. cit. note 3. Free trade proponents have pointed to studies showing no wholesale movement of industry to take advantage of more lax regulation. While there is no doubt that plant siting decisions respond to a host of factors including wage rates, infrastructure development, access to transport, markets, and finance, etc., such studies looked only at technologically defined pollution control costs (i.e., the cost of installing scrubbers) and not at the host of preventative, legal, process-related, waste disposal, and other costs associated with a certain level of regulatory scrutiny. A broader definition of "pollution-related costs" might well lead to a different result. Furthermore, such decisions are affected not just by regulatory climate, but by the strength of local opposition to siting of hazardous or polluting plants in a given locality.

5. Summers, Lawrence H. World Bank Office Memorandum, 12 December 1991.

6. Preparatory Committee for the UNCED Third Session, The International Economy and Envi-

ronment and Development, Report of the Secretary General of the Conference, UN Doc. A/Conf. 151/PC/47, 17 July 1991.

7. Greenpeace International "Protection of the Environment Through the 'Precautionary Action Approach'." July 1992, p. 2.

8. Raghavan, C. *Recolonization: GATT, the Uruguay Round and the Third World*. Penang, Malaysia: Third World Network, 1990, p. 120-22.

9. de Almeida, F. "The 'New' Intellectual Property Regime and its Economic Impact on Developing Countries." In *Liberalization of Services and Intellectual Property in the Uruguay Round of GATT*, edited by G. Sacerdoti, 1990, p. 83.

10. *Technological Transformation*. A report Prepared for the Fourth Session of the Preparatory Committee for the United Nations Conference on Environment and Development, 2 March - 3 April 1992, Greenpeace International, Amsterdam, The Netherlands. In this submission to UNCED, Greenpeace argues that many pollution control technologies merely displace the environmental problems. The failure of the North to truly address the environmental implications of its own technological development brings into question the argument that the North's technology can "promote sustainable development" elsewhere.

11. See Raghavan, C., Op. cit. note 8, p. 124; see also Agarwal, A., and S. Narain. "A Royalty for Every Potato." *Earth Island Journal* Earth Island Institute, Winter 1992, p. 33; and Arden-Clarke, C. "The General Agreement on Tariffs and Trade, Environmental Protection and Sustainable Development." Gland, Switzerland: World Wildlife Fund November 1991, p. 27.

12. Draft Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, GATT Secretariat. MTN.TNC/W/FA, 20 December 1991 (Dunkel Text), Section L, Sanitary and Phytosanitary Standards. See also Public Citizen December 26 memo regarding sanitary and phytosanitary standards (SPS) for an analysis of these provisions. Although the U.S. government promised that SPS provisions in a new NAFTA would not lessen the degree of protection now afforded by U.S. law, the U.S. Trade Representative has on

other occasions stated that GATT rules will apply in NAFTA. The experience of the U.S.-Canada agreement is not encouraging: Canada has agreed to work toward "equivalence" with the U.S. approach to pesticides. If carried through, this would require Canada to change its precautionary approach, which requires that a pesticide be shown safe, to a U.S. risk-benefit approach which has led to registration of over seven times more pesticide products in the U.S. than in Canada. See also Shrybman, S. "Trading Away the Environment." *World Policy Journal* Volume IX, No. 1, Winter, 1992, p. 105.

13. See e.g., Public Citizen December 26, 1991 memo re: SPS, Op. cit. note 12, p. 9.

14. See "International Food Standards and the General Agreement on Tariffs and Trade" International Organization of Consumers Unions, memo, November 1990; see also Shrybman, S., Op. cit. note 11.

15. General Agreement on Tariffs and Trade (GATT), Article I.

16. GATT, Article III.

17. GATT, Article XVI.

18. GATT, Article XI.

19. *United States - Restrictions on Tuna Imports*. Report of Panel, General Agreement on Tariffs and Trade, D621/R, September 3, 1991. While this restriction is not part of the text of the Agreement itself, it was confirmed both by the GATT dispute panel decision and by a forthcoming report from the GATT Secretariat, *Trade and the Environment* Op. cit. note 2.

20. GATT, Article XXII.

21. GATT, Article XXIII.

22. GATT, Article XXIII:2.

23. See Finger and Olechowski, *The Uruguay Round: A Handbook for the Multilateral Trade Negotiations*. 1987, p. 172-73.

24. Both the Multifibre Arrangement (MFA) setting quotas on textiles, and "voluntary" restraints on steel exports are exceptions to GATT

"free" trade rules designed to protect Northern textile and steel industries from competition. See Hudek, Robert E., "Tiger, Tiger in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures." p. 125; and Chak Mun, "Comment." p. 213, In *The New GATT Round of Multilateral Trade Negotiations*. Second Edition, edited by Petersmann. E.R. and M. Hilif. Deventer, Boston: Kluwer Law and Taxation, Publishers, 1991.

25. An example would be the switch to processed timber products from raw logs. For an argument that the ban of raw log exports and switch to processed plywood exports in Indonesia actually increased the rate of deforestation rather than conserving resources, see Gillis, M. "Indonesia: Public Policies, Resource Management and the Tropical Forest." p. 43, 71. In Repetto, R. and M. Gillis. *Forest for the Trees: Government Policies and the Misuse of Forest Resources*. World Resources Institute, 1989.

26. Article XI of GATT prohibits quantitative restrictions; see Arden-Clarke, C. Op. cit. note 11, p. 14.

27. U.S.-Canada Free Trade Agreement, Article 904.

28. See Hudson, S. monograph: "Environmental Concerns Related to a U.S. - Mexico - Canada Free Trade Agreement." National Wildlife Federation, Nov. 27, 1990. Mexico's oil industry is nationalized, but a combination of a need for new capital, a policy of "privatization" and the provisions of both NAFTA and GATT liberalizing foreign investment may well lead to increased exploitation of Mexican oil by either Mexico itself or U.S. firms.

29. "The Uruguay Round Negotiations 1986 - 1991." In Petersmann. E.R. and M. Hilif, eds. *The New GATT Round of Multilateral Trade Negotiations*. Op. cit. note 24, p. 501, 537.

30. Opinion of Advocate General F.G. Jacobs in European Court of Justice Case 2/90 (Commission v. Belgium), delivered on 10 January 1991.

31. Declaration on the Human Environment, (Stockholm Declaration) Principle 21. UN Doc. A/CONF. 48/14 (1972), Reprinted in 11 I.L.M. 1416, 1420 (1972).

32. Janis, M. *An Introduction to International Law*. Boston, MA: Little Brown, 1988 p. 245-47

33. Montreal Protocol on Substances that Deplete the Ozone Layer, opened for signature September 16, 1987, reprinted in 26 I.L.M. 1550, 1987.

34. Article XX reads in part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....(b) necessary to protect human, animal or plant life or health;

....(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;..."

A GATT dispute resolution panel recently held that the Article XX exception to GATT rules only applies within the national territory of the regulating party; the Protocol provisions apply to protecting the global atmosphere. United States-Restrictions on Imports of Tuna, GATT, D621/R, September 3, 1991. While not yet an official decision of GATT, the tuna-dolphin panel decision exemplifies the organization's thinking.

35. Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, United Nations Environment Program, Basel, Switzerland, 22 March 1989. Preamble para 6 and Article 4, para 1, (a) and (b). The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa. Adopted under the auspices of the Organization of African Unity, Bamako, Mali, January 1991 has stronger provisions prohibiting waste trade, which also would conflict with trade rules on import restrictions.

36. Report of the Panel, General Agreement on Tariffs and Trade, *United States - Restrictions on Imports of Tuna*, 16 August 1991. Section 5.15: "The Panel concluded...that the Note Ad Article III covers only those measures that are applied to the product as such. The Panel noted that the MMPA regulates the domestic harvesting of yel-

lowfin tuna to reduce the incidental taking of dolphin, but that these regulations could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product."

37. Ironically, recent proposals to strengthen GATT disciplines on technical standards (technical barriers to trade) would include processes as well as products, but only to subject national regulations affecting process standards to internationally set lowest common denominators and preemption of state and local laws. See Draft Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, GATT Secretariat. MTN.TNC/W/FA 20 December 1991, Section G. These proposals would move in exactly the wrong direction, giving governments less, rather than more, possibilities of regulating harmful production processes.

38. Annotated Checklist of Principles on General Rights and Obligations. Note by the Secretariat, Preparatory Committee for UNCED, 26 July 1991, UN Doc. A/CONF. 151/PC/78.

39. See Shrybman, S. monograph: *Selling the Environment Short, An Environmental Assessment of the First Two Years of Free Trade between Canada and the United States*. Canadian Environmental Law Association, November 1990.

40. Ibid.

41. In the Danish case, the European Court of Justice (ECJ) upheld the general use of a compulsory bottle recycling scheme, but found that a requirement (which Denmark argued was needed to make the system viable) that only certain types of containers be used discriminated against imports of foreign drinks and so was "disproportionate" and unlawful. In "Re Disposable Beer Cans: E.C. Commission v. Denmark", [1989] 1 C.M.L.R. 619. The Belgian case involves an attempt by the Belgian region of Wallonia to prohibit waste imports, and is currently before the ECJ. ECJ Case 2/90 (Commission v. Belgium).

42. GATT Dispute Resolution Panel Decision, "Canada - Measures Affecting Exports of Un-

processed Herring and Salmon." GATT, BISD, 355/114 (1988).

43. GATT Dispute Resolution Panel Decision, "Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes." GATT, BISD, 36S/392 (1990).

44. GATT Dispute Resolution Panel Decision, "European Economic Community and Others v. United States." (Superfund Taxes) reprinted at [1988] 3 C.M.L.R. 605.

45. Op. cit. note 36. The dispute resolution panel's decision in this case has not yet been approved by the Contracting Parties to GATT because Mexico decided to defer consideration of the decision at the October 1991 meeting of GATT.

46. Writers have disagreed as to the history and purpose of Article XX. Compare Shrybman, S. "International Trade and the Environment." *The Ecologist* Vol. 20 no. 1, Jan./Feb. 1990 (purpose was restricted to quarantine regulations), with Charnovits, S., "Exploring the Environmental Exceptions to GATT Article XX." *Journal of World Trade* Vol. 25, p. 37, October 1991, (broader environmental purpose in Article XX). In contrast, the GATT Agreement on Technical Barriers to Trade (Standards Code), 31 U.S.T.S. 405, T.I.A.S. no. 9616 (1979), does recognize in its preamble that "no country should be prevented from taking measures necessary to ensure the ... protection of human animal or plant life or health, of the environment..., subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade;". The Code (in Article 2.2.) requires use of international standards, if these exist, except where the regulating party explains that such standards are inappropriate for, among others, environmental reasons. These are both significant improvements over GATT itself, at least as interpreted to date. Nonetheless, the regulating state still (per Article 2.1) apparently bears the burden of showing

its actions do not have the effect (or the intent) of creating unnecessary obstacles to trade—which begs the question of how to prove something is "necessary."

47. See, e.g., the statement of the U.S. delegation to UNCED Precom III regarding the Statement of General Principles, UN doc. A/CONF.151/PC/78). 1991.

48. See Committee Report: *Response of the [U.S.] Administration*. Transmitted to the Congress by the President, May 1, 1991, reprinted in Committee on Ways and Means, U.S. House of Representatives, Exchange of Letters on Issues Concerning the Negotiation of a North American Free Trade Agreement, p. 12. 102nd Congress, 1st Session.

49. See Committee Report: *Enterprise for the Americas Initiative*. Hearing before the Subcommittees on Human Rights and International Organizations, Western Hemisphere Affairs, and International Economic Policy and Trade of the Committee on Foreign Affairs, House of Representatives, 101st Congress, 2nd Session, June 28, 1990.

50. "...memoranda submitted to the panel shall be considered confidential...". See Draft Final Act December 20, 1991, op. cit. note 12, Sec. 11 on Dispute Resolution.

51. See, e.g., Petersmann. "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT." In Petersmann and Hilif, p. 323, 324-25, Op. cit. note 24.

52. Draft Final Act, op. cit. note 12, Section 12, Article 14. The proposed change would make such decisions automatically applicable unless all Contracting Parties voted to reject the decision, a much more unlikely prospect. As it stands now, GATT dispute panel decisions have no binding force unless adopted by a consensus of the Contracting Parties to the Agreement. GATT, Article XXIII.

53. Arden-Clarke, Op. cit. note 11, p. 30.

**NAFTA'S EFFECT ON WILDLIFE CONSERVATION AND
ANIMAL WELFARE LEGISLATION**

Testimony of

**The Humane Society of the United States
Humane Society International**

**Submitted to the House Merchant Marine
and Fisheries Committee
Subcommittee on Natural Resources
and the Environment
March 2, 1993**

Presented by

**Leosteffy Jenkins
Legal Advisor on Trade and International Affairs**

This statement is presented on behalf of the following organizations:

**The Humane Society of the United States
Humane Society International
Earth Island Institute
Whale and Dolphin Conservation Society
American Cetacean Society
Animal Welfare Institute
American Society for the Prevention of Cruelty to Animals
International Wildlife Coalition
Environmental Investigation Agency
The Society for Animal Protection Legislation
Animal Protection Institute
Rainforest Action Network
International Primate Protection League
The Fund for Animals
American Humane Association
Cetacean Society International**

EXECUTIVE SUMMARY OF NAFTA'S EFFECT ON WILDLIFE CONSERVATION AND ANIMAL WELFARE LEGISLATION

The North American Free Trade Agreement (NAFTA), as currently drafted, fails to protect key conservation legislation. The Marine Mammal Protection Act, the Wild Bird Conservation Act of 1992, the High Seas Driftnet Fisheries Enforcement Act of 1992, the Sea Turtle Act, and the African Elephant Conservation Act all contain key provisions that would violate the current version of NAFTA.

Micky Kantor, the United States Trade Representative, has promised that NAFTA will not be presented to Congress until such time as an environmental side agreement has been negotiated. The solutions that USTR has proposed to date, however, will not alleviate NAFTA's incompatibility with the above-referenced conservation measures.

If NAFTA is to be compatible with the goals of conservation, NAFTA must explicitly:

- Recognize that countries have the right to enact legislation to protect global resources;
- Permit the use of process standards as a basis on which to distinguish otherwise "like products";
- Authorize the setting of standards based upon the precautionary principle;
- Recognize that trade sanctions can be an effective enforcement mechanism;
- Recognize that Parties should not be permitted to adjudicate challenges to certain conservation and animal welfare initiatives under NAFTA or GATT;
- Give environmental, conservation and animal welfare experts an active and dispositive role in the dispute resolution process; and
- Provide for public access to and participation in dispute resolution proceedings.

A NAFTA that is insensitive to conservation concerns will become a convenient vehicle to further impinge upon, chill or deter the enactment and enforcement of legitimate conservation and animal protection measures.

INTRODUCTION

Set forth in Part I herein are concerns which The Humane Society of the United States/Humane Society International has with respect to the North American Free Trade Agreement (NAFTA). To highlight the immediacy of our concerns, included as Part II is a brief overview of conservation legislation that has been or may be adversely affected by the current rules of "free trade". Lastly, Part III provides some substantive suggestions for making NAFTA more compatible with conservation goals.

1991 marked the end of an era when conservation goals could be viewed in isolation from and without reference to the system of "free trade." In that year a dispute resolution panel convened under the General Agreement on Tariffs and Trade (GATT) held that the United States could not, consistent with GATT, seek to protect natural resources outside of its territorial jurisdiction, nor could the United States prohibit the importation of tuna products based solely on the production method used to harvest such tuna. That decision has been costly to the goals of the conservation and animal welfare community and has necessitated the expenditure of scarce resources by many conservation groups that now have to be conversant in the rules of "free trade" as embodied in GATT, the United States - Canada Free Trade Agreement (FTA) and now NAFTA.

Although the Clinton Administration has said that NAFTA will not be presented to Congress until such time as an environmental side agreement has been negotiated, we are concerned that the terms of reference for the negotiation of such agreement are too narrow in scope.

The environmental debate currently consists of a discussion of the way in which NAFTA can accommodate some environmental goals while still maintaining all of its "free trade" objectives. The irony of this situation is that "free trade" is not itself a goal, rather it is a means to an end. "Increased world trade leads to higher per capita incomes, and with that the freedom and incentive to devote a growing proportion of national expenditure to the environment," says a GATT report on trade and environmental issued February 3, 1992. Theoretically, the goal promoted by "free trade" is an improved quality of life within each society -- the same objective that environmental, conservation and consumer groups seek through direct domestic legislation.

In its purest form, "free trade" is a manifestation of international trickle-down economics. Americans, however, have rejected this economic model and opted instead for President Clinton's vision of an active, responsive government that balances economic expansion with the needs of the American people. If the NAFTA package is to represent the will of the American people and President Clinton's vision for America, it must be responsive to

environmental, conservation and consumer goals. NAFTA can serve to further the President's economic vision only if it explicitly safeguards legislation that advances environmental, conservation, health, safety and animal protection goals.

I. NAFTA's TEXTUAL PROBLEMS

As currently drafted, NAFTA endorses and explicitly contains some of the most restrictive principles of GATT. Set forth below are those provisions which are of particular concern to the conservation and animal protection community. To facilitate an understanding of the practical implications of each provision, examples of conservation initiatives that have or could be adversely impacted are provided.

A. NAFTA Endorses the GATT Principle that Parties May Not Distinguish Between Goods Based Upon Process Standards

Article 14 of the GATT Standards Code provides for dispute settlement when technical requirements are stated in terms of process and production methods rather than in terms of the characteristics of the product. As currently drafted, Article 903 of NAFTA implicitly incorporates this principle.

The GATT panel in the tuna-dolphin case determined that the United States could not restrict the importation of dolphin deadly tuna based upon standards that regulated the method of harvesting tuna.

B. NAFTA's Standards Provisions Unduly Restrict the Criteria Upon Which Domestic Standards May Be Based.

NAFTA requires Parties to use international standards as a basis for standards-related measures, unless it can be proven that such standards would be an ineffective or inappropriate means to fulfill a "legitimate objective". The circumstances under which deviation from international standards would be permissible are highly restrictive. An international standard may be found to be "ineffective" or "inappropriate" only in such circumstances where fundamental climatic, geographical, technological or infrastructural factors are involved. Factors such as lack of adequate enforcement in the producers home country would not, according to traditional rules of statutory construction, be sufficient justification for determining that an international standard is "ineffective or inappropriate".

The Canadian Puppy Initiative, as discussed in part II herein, prohibits the importation of puppies from Class B animal dealers. Because to date, the U.S. lacks effective enforcement of its animal

welfare laws as applied to US "puppy mills", Canada has no other effective means of excluding puppies with serious contagious or genetic diseases.

C. NAFTA incorporates the GATT Principle that a Party May Not, Consistent With Trade Principles, Seek to Protect Environmental Resources Outside Its Territorial Jurisdiction.

Article 2101 of NAFTA incorporates the General Exceptions provisions of the GATT. Article XX(b) of GATT permits trade restrictive measures that would otherwise violate the GATT, if such restrictions are "necessary to protect human, animal or plant life or health." The GATT panel in the tuna-dolphin case held that Article XX(b) does not apply to domestic measures which seek to protect environmental resources outside the territorial jurisdiction of the regulating country. The current NAFTA text does not in any way limit this interpretation.

D. NAFTA Fails to Incorporate Democratic Principles In Its Dispute Resolution Process

Like GATT, NAFTA provides no mechanism for public access to or participation in the resolution of disputes involving environmental, conservation, health or safety matters. Article 2012 of NAFTA provides that "[t]he panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential." As the GATT panel decision in tuna-dolphin case demonstrates, a secretive system increases the chance that the concerns of the community at large will not be addressed adequately.

In addition, the dispute resolution provisions do not guarantee that appropriate environmental, conservation, or other relevant experts will be consulted in the process. A dispute resolution process that does not seek to incorporate the learned opinions of relevant experts can not adequately balance environmental and conservation goals with those achieved by a system of "free trade".

The GATT panel found in the tuna-dolphin case that the United States had not exhausted all options reasonably available to achieve its dolphin protection objectives prior to implementation of the embargo. Such a finding is an excellent example of the distortions that can occur when neither the public nor experts are brought into the dispute resolution process.

II. AN OVERVIEW OF CONSERVATION INITIATIVES ADVERSELY AFFECTED BY THE RULES OF FREE TRADE

Cited below are examples of conservation initiatives that have been (or may be) adversely affected as a result of GATT or NAFTA. These examples demonstrate that current trade rules can impact a surprisingly broad array of initiatives. In reviewing such examples one should query whether free and unrestricted trade in such circumstances does in fact further the goal of an increased quality of life within each society.

A. The Marine Mammal Protection Act (MMPA)

As discussed previously, in 1991 a GATT panel found that the embargo provisions of the MMPA violated GATT. The provisions at issue direct the Secretary of Treasury to ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of dolphins and other marine mammals in excess of U.S. standards. In 1984, the MMPA was amended to require that each nation wishing to export tuna to the United States document that it had adopted a dolphin conservation program "comparable" to that of the U.S. fleet. In 1990, Mexican yellowfin tuna was embargoed by the Secretary under the comparability provisions of the MMPA. Mexico sought relief from GATT.

The purpose of the MMPA provisions is to decrease to zero mortality the number of marine mammals killed as a result of commercial fisheries. In the Eastern Tropical Pacific (ETP), an estimated 6 million dolphins have been killed since 1959 by U.S. and foreign fisherman using purse seine nets to harvest yellowfin tuna. The law has been extremely effective in achieving its goals. The number of dolphin mortalities in the ETP were reduced from a high of 423,678 in 1972 to 27,292 in 1991.

To date the MMPA provisions have in no way resulted in an overall competitive advantage for the U.S. tuna industry in the ETP. If anything, the law has created a disincentive within the U.S. industry to continue fishing in the ETP.

B. The Wild Bird Conservation Act of 1992 ("Wild Bird Act")

The Wild Bird Act directs the Secretary of the Interior to ban or set quotas on the importation of all (both CITES and non-CITES) species of exotic birds from any country that has not implemented a management program that provides for conservation of the species and its habitat, for humane methods of capture, transport and maintenance of the species, for effective enforcement of illegal

trade, as well as a variety of other conservation goals.

As originally drafted, the Wild Bird Act applied only to species listed in Appendix I and II of the Convention on International Trade in Endangered Species of Flora and Fauna (CITES). This was unsatisfactory to the conservation community because past trading history demonstrated that the commercial community would simply shift the market to non-CITES species, thus putting increased pressure on species that had not previously been imported in large numbers.

The Bush Administration and some members of Congress who opposed the bill balked at the expanded scope of the Act claiming that the new provisions violated GATT. The Act almost failed to be passed last Congress because of the so-called GATT concerns.

The GATT concerns brought up by the Administration and others were simply spurious and an attempt use GATT to sabotage the bill. In fact, there are GATT inconsistencies in the Wild Bird Act, but these were never addressed by the Act's detractors. Only after the environmental community suggested a more draconian (but GATT consistent) solution to "remedy" the GATT problems were the GATT concerns dropped.

C. The High Seas Driftnet Fisheries Enforcement Act of 1992 ("Driftnet Act")

The Driftnet Act directs the Secretary of Commerce to prohibit the importation of all fish, fish products and sport fishing equipment of any nation or nationals which continue to conduct large-scale driftnet fishing beyond the exclusive economic zone of any nation after December 31, 1992.

The purpose of the Driftnet Act is to complement UN Resolution 46/215 which calls for a complete worldwide ban on driftnet fishing by December 31, 1992. The UN Resolution was in response to evidence that large-scale driftnet operations are highly destructive to the living marine resources and ocean ecosystems, and pose an especially significant threat to slow-reproducing species like marine mammals, birds and sharks, which take many years to recover.

This Act could be challenged under NAFTA because like the MMPA, it seeks to protect natural resources outside the U.S. territorial jurisdiction and also requires the method by which fish are harvested or produced.

D. The Sea Turtles Act

In 1989, Congress passed PL. 101-162, an Act that protects sea turtles. The Act prohibits the importation of shrimp and shrimp products from any producing country that does not have an adequate sea turtle conservation program as defined by the Act and that does not require its shrimp vessels to use turtle excluder devices (TEDs). Currently, no country has been embargoed under the Act.

The purpose of the Act is to promote global protection of five species of endangered sea turtles seriously threatened or endangered by fishing practices of the shrimp industry. It is estimated that 150,000 sea turtles are being killed annually in shrimp nets. TEDs have been found to be 97 percent effective in reducing the mortality of sea turtles.

Despite having promised to the contrary, Mexico has not secured the use of TEDs on Mexican shrimp vessels. To the contrary, there is some evidence that some interests within the Mexican government are working harder to prove that TEDs do not work than to successfully implement them.

Mexico could challenge this Act under NAFTA. Like tuna-dolphin, the Act attempts to protect resources outside U.S. territorial jurisdiction. In addition, the Act regulates the method by which shrimp can be produced. Based on these two factors alone, the Act would violate both GATT and NAFTA.

E. The African Elephant Conservation Act

The African Elephant Conservation Act ("Elephant Act") directs the Secretary of the Interior to prohibit the importation of raw or worked ivory from any producing country that does not have an adequate elephant conservation program as defined in the Act. An import ban on all African elephant ivory took effect on June 9, 1989 pursuant to the provisions of the Act.

The purpose of the Elephant Act is to help stop the flow of illegal ivory into the United States. Passage of the Elephant Act was prompted by evidence that the continental population of African elephants had declined by at least 50 percent in only ten years due to illegal poaching and pressures caused by international trade in ivory. Experts estimated that the African elephant would become extinct by the turn of the century.

This Act could be challenged under NAFTA and GATT because it seeks to protect wildlife resources outside U.S. territorial jurisdiction. In addition, the Act sets standards that regulate the method in which ivory can be produced. Like tuna-dolphin, the Elephant Act could be found to be inconsistent with GATT and NAFTA.

F. Canada's Regulatory Proposal for Importation of Puppies from the United States

The Canadian government recently issued regulations that would permit only Class A animal dealers, that is actual breeders, to import puppies into Canada. The effect of the regulation is to prohibit middle men whose primary if not sole supply of puppies come from the notorious U.S. puppy mills.

Approximately 80% of the puppies sold in the Canadian retail market are purchased from U.S. puppy mills. In Canada, like in the United States, there is growing public concern about the condition of pet store puppies as well as a marked increase in the number of consumer complaints about sick puppies. In response to the public's concerns and because the United States has not been able to adequately enforce its own Animal Welfare laws, Canada sought to protect itself from the U.S. puppy mill crisis through import regulations.

As required pursuant to section 708 of the U.S. Canada Free Trade Agreement (FTA), the Canadian regulation was submitted to the Animal Health Technical Working Group, which agreed that the most effective way to reduce the potential for the export of diseased puppies from the United States puppy mills into Canada would be through the proposed regulations.

Despite this finding, the United States Department of Agriculture (USDA) conveyed to Canada that the United States would seek trade remedies pursuant to FTA if the regulation was adopted. In response to USDA's actions, Canada agreed to weaken considerably its regulations and revised the proposed regulation so that its effectiveness is now dependant upon strict enforcement by the United States of its Animal Welfare laws. Given USDA's history of lax enforcement of these laws, it is unlikely that the new regulation will have any effect on the importation of sick puppies into Canada.

III. SUBSTANTIVE SUGGESTIONS FOR MAKING NAFTA MORE COMPATIBLE WITH CONSERVATION GOALS

A. The NAFTA Package Must Explicitly Recognize that Certain Trade Effects Should Not be Adjudicated Under NAFTA Or Any Other Trade Regime.

Within the context of the overall NAFTA package, the United States should seek to establish a binding principle that certain environmental, conservation, health and safety laws may not be

adjudicated under any trade regime. To achieve this objective, a special review process should be established for challenges to laws implicating environmental, conservation, health and safety protection.

Whenever a challenge implicates environmental, conservation, or other such protection, as a threshold matter, a panel of experts should be convened to determine whether the sole purpose of a challenged measure is to advance a legitimate environmental, conservation, health or safety goal. In the event of a positive finding, the dispute should be dispositively dismissed. Where such panel determines, however, that the complained of measure is not a legitimate environmental, conservation, health or safety measure, or that such measure is applied in an inconsistent or discriminatory manner (as opposed to having a discriminatory affect), the normal NAFTA dispute process should be allowed to continue, although the trade panel should be required to give great deference to the substantive findings of the special panel.

Only such a process will insulate conservation programs such as the those discussed above, from the negative effects of free trade.

B. NAFTA Must Explicitly Recognize That Countries Have The Right To Enact Legislation to Protect Global Resources

NAFTA must recognize that environmental degradation knows no boundaries and that protection of global resources must be comprehensive and cost efficient if environmental protection is to be achieved. An environmental solution which seeks to protect global resources on a systemic basis will be more cost efficient than a solution that seeks to protect in a piecemeal fashion.

The NAFTA package must explicitly permit the extraterritorial application of domestic conservation laws. Many of the laws discussed herein could be challenged under NAFTA if extraterritorial jurisdiction is not provided for within the NAFTA package.

C. NAFTA Must Explicitly Permit the Use of Process Standards As a Basis on Which to Distinguish Otherwise "Like Products"

NAFTA must recognize that how a product is produced is as important as the product itself. Recognizing the legitimacy of process standards would not only level the economic playing field, it would stem environmental degradation on this continent. Production process standards could be used to encourage producers to use environmentally friendly production methods in order to achieve the benefits of free and unrestricted trade. Such an incentive based system would still be in accordance with the principles of free

trade.

The dispute between Mexico and the United States with respect to dolphin-deadly tuna highlights the necessity for explicit text on this issue. After considerable political negotiation, Mexico agreed to join the United States in a global moratorium on the setting of nets on dolphin and to use the moratorium as a basis for prohibiting imports of dolphin-deadly tuna. To date, Mexico has failed to enter into the moratorium. The failure of such agreement to be effectively implemented serves to underscore the necessity for specific text in the NAFTA package setting forth the right of NAFTA parties to set standards and distinguish between products on the basis of production methods. It also underscores the need to demand that Mexico immediately enter into the moratorium agreement as a precondition of NAFTA.

D. Preservation Should Be A Legitimate Criteria Upon Which to Base Standards

NAFTA should explicitly recognize that preservation of species and habitat is a legitimate goal. Thus, parties should be permitted to set standards based upon the precautionary principle, rather than upon an actual finding of environmental degradation.

E. NAFTA's Dispute Resolution Processes Must Incorporate the Principles of A Democratic Institution

The GATT panel's decision in the tuna dolphin case demonstrates the inadequacies in the current NAFTA dispute process. NAFTA's dispute process must be opened to public participation and public scrutiny if it is to be an instrument that serves the goals of a democratic society.

In addition, the dispute process must be broadened to incorporate a mechanism for addressing multiple goals beyond the institution of free trade. Experts on habitat and species conservation, animal welfare, as well as other environmental, health and safety issues should be given an active and dispositive role in the dispute resolution process.

F. NAFTA Should Explicitly Recognize that Trade Sanctions Can be An Effective Enforcement Mechanism

The use of trade sanctions as an enforcement mechanism is currently being discussed by CITES, the Inter-American Tropical Tuna Association, among others. NAFTA must recognize that trade sanctions may be the most effective means of ensuring compliance

within the context of an international environmental or conservation agreement. NAFTA must grandfather not only those environmental agreements listed in Article 104, but all international environmental and conservation agreements.

CONCLUSION

GATT and NAFTA have already proven to be incompatible with conservation goals. A NAFTA that is similarly insensitive to conservation concerns undoubtedly will become a convenient vehicle to further impinge upon, chill or deter the enactment and enforcement of legitimate conservation and animal protection measures.

NAFTA can be a progressive environmental and conservation document, but only if its provisions are tailored in some significant respects. The supplemental environmental agreements must include substantive and binding provisions to protect and promote domestic and global conservation measures. Only then will NAFTA reflect Clinton's vision for America and America's hope for the future.



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OVERVIEW OF PROPOSED NAFTA ENFORCEMENT APPROACHES

March 1993

Proposal: Environmental Enforcement Agreement Following NAFTA IPR Provisions

Summary: Use NAFTA's intellectual property (IPR) provisions as a model for enhanced environmental enforcement through each party's domestic legal systems. NAFTA's IPR provisions require each party to provide IPR right holders legal protection, access to each party's domestic courts, and procedural due process in domestic proceedings, to enforce these protections.

- Pros:**
- model has already been negotiated in other (IPR) context
 - relatively low level of sovereignty intrusion
- Cons:**
- providing necessary standing in domestic courts to foreign parties raises serious Constitutional issues in all three parties
 - difficulty in determining who has the right to bring cases
 - requires costly and time consuming litigation (prevents those with few fiscal resources from utilizing the enforcement option)
 - concerns exist over corruption in Mexico's judicial and administrative systems

Proposal: Environmental Compliance Through Increased Public Access to Information

Summary: Encourage greater environmental compliance by a supplemental agreement calling for increased public access to environmental information through "sunshine laws", such as community right to know.

- Pros:**
- low cost
 - minimal bureaucracy
 - relatively low level of sovereignty intrusion
- Cons:**
- no sanction powers—lacks teeth
 - does not provide incentive for government enforcement
 - information can be too technical and/or voluminous to be of real use

Center for International Environmental Law
 NAFTA Enforcement Options
 March 1993

Proposal: Encourage Environmental Enforcement Through Unilateral Trade Measure—"Green 301"

Summary: Include in NAFTA implementing package provisions for the use of section 301 procedures and remedies to address competitive disadvantages caused by the failure of environmental enforcement in trading partner countries.

- Pros:**
- can apply broader than NAFTA parties—does not "penalize" Canada and Mexico by virtue of their NAFTA party status
 - existing section 301 procedure leads to settlement in most cases
 - highest degree of U.S. control over process
 - provides relatively strong incentive for partners to enforce laws
- Cons:**
- section 301 is presently under attack by major trading partners, and a Green 301 will be similarly assailed, especially by developing countries
 - mechanism could fall prey to protectionist uses
 - raises serious sovereignty issues

Proposal: Encourage Environmental Enforcement Through North American Commission on the Environment (NACE) Authorized Tariff Snapbacks

Summary: Allow dispute panels formed under NACE to authorize a party to use tariff snapbacks where lax environmental enforcement is creating unfair trade advantages and consultation and technology cooperation efforts have failed to resolve situation. Fines can be used to halt polluting activities that cause personal injury, but not trade injury. NACE selects which cases are heard by panels.

- Pros:**
- trilateral mechanism minimizes infringement on each party's sovereignty
 - limits the use of trade measures to cases with trade ramifications
 - use of tariff snapback simplifies calculation of penalty
 - builds upon emergency action provisions already in NAFTA
 - allows unfounded cases to be screened out before costly process
 - public process
- Cons:**
- limits the use of trade measures to cases with trade ramifications
 - infringes, to a certain extent, on each party's sovereignty over environmental enforcement decisions
 - mechanism could fall prey to protectionist uses

Center for International Environmental Law
 NAFTA Enforcement Options
 March 1993

Proposal: Encourage Environmental Enforcement Through Use of Trade Remedies in the Case of a Pattern of Non-Compliance or Non-Enforcement

Summary: NACE hears complaints and investigative arm determines if pattern exists and then notifies national bodies of finding. NACE consultants work with offender to address problem, but after four month grace period, NACE reports whether progress toward solution, and governments may then decide to use trade penalties.

- Pros:**
- strong emphasis on solving pollution problem through use of grace period and consulting arm
 - provides public process in NACE component
 - NACE investigation carried out through national enforcement bodies
 - NAFTA dispute panel rules on procedural compliance and fairness of penalty
 - permits unilateral final decision to impose penalty

- Cons:**
- use of trade remedies will raise sovereignty issues and be influenced by political considerations
 - requires complex finding of pattern of non-compliance or non-enforcement

Proposal: Make NACE an Equal Partner with NAFTA Free Trade Commission (FTC) in Resolving Certain Environmental Disputes, and Permit NACE to Impose Trade Remedies in Other Circumstances

Summary: NACE would work with the FTC in environmentally-related disputes and would have the authority to address matters concerning transboundary pollution, global commons and international agreements, and to levy maximum one percent tariffs in these instances after public hearings and consultations

- Pros:**
- addresses environmental injuries only, therefore less subject to protectionist influences
 - facilitates increased environmental expertise and public participation in NAFTA Chapter 20 disputes without directly renegotiating NAFTA
 - trilateral mechanism minimizes infringement on each party's sovereignty
 - public process

- Cons:**
- limits scope of NACE's environmental decision making to three specific instances
 - minimal amount of penalty may not be sufficient deterrent
 - raises sovereignty issues and subject to being influenced by political considerations

ANNEX III

March 4, 1993

The Hon. Mickey Kantor
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20506

Dear Ambassador Kantor:

As we all acknowledged on February 23, 1993, during a meeting with you, a number of environmental, conservation, health, and safety problems remain in the present NAFTA. We, the undersigned, hope that this letter clarifies the position of our groups with respect to the President Clinton's NAFTA package. Successful resolution of these problems would not only promote sustainable hemispheric trade, but would also send a clear message to the Uruguay Round negotiators in Geneva. While all the groups signed to this letter acknowledge the NAFTA problems identified, individual groups reserve the right to offer varying solutions to these problems.

First and foremost, we support the President's call for an "environmental" supplemental agreement that will establish a strong North American Commission on the Environment (NACE). However, such a supplemental agreement must clarify various other provisions of the existing NAFTA. In our opinion, these elements of a supplemental agreement should be in the form of a protocol, legally binding upon any party to NAFTA, and of equal stature to NAFTA. Some groups have drafted protocol language for the NACE and are presently drafting similar language for the protocol's other provisions that will be forwarded to you shortly.

I. ENFORCEMENT:

Trade should not be based on weak enforcement of established standards. Enforcement is a crucial issue. We should not subject U.S. citizens to economic, health, safety, or environmental injury as a result of weak enforcement of standards elsewhere. Nor should our NAFTA partners be harmed by a failure of U.S. enforcement. Sanctions, including both trade and non-trade measures, must be available to ensure compliance. Recognizing that sovereignty concerns exist, we propose that a trilateral mechanism, the North American Commission on the Environment (NACE), as discussed below, be established with sufficient powers to ensure adequate enforcement of existing and future laws.

II. NAFTA'S ENVIRONMENTAL OMISSIONS AND AMBIGUITIES:

We recognize the President's desire not to reopen the NAFTA text. Yet, there are provisions in the present text that are either contradictory or unclear, and work to the detriment of

environmental, conservation, health, and safety protection. The Bush NAFTA also completely fails to address several important concerns. Therefore, the topics listed below are areas where a NAFTA protocol must rectify present NAFTA omissions or ambiguities.

A. ENVIRONMENTAL REMEDIATION:

Despite the fact that the several border agreements between the NAFTA parties have been considered separate from the present NAFTA, we do not believe that NAFTA should go forward until enforceable commitments have been made to clean up the border regions. Estimates for the U.S.-Mexico border clean-up range from \$ 5 to 15 billion. The U.S.-Canada border also suffers from trade induced problems.

B. FUNDING:

A secure source of funding for proper infrastructure development, environmental enforcement, increased investigation, and clean-up for all NAFTA-related environmental programs is vital. Because national appropriations processes do not provide a secure source of funding, we believe that designated funding sources, based on fairness and the "polluter pays" principle, must be developed as a prerequisite to implementation of NAFTA.

Ideas that deserve attention include: a) "snap-back" tariffs applied to sectors with lax enforcement of existing standards; b) a small transaction fee on all goods and services that could be phased out over a specified number of years; c) a directed "green" fee; d) an environmental countervailing duty on economic activity that is environmentally unsustainable or below standard; e) "earmarked" tariffs, which could be phased out during the first 10-15 years of NAFTA; and f) development of a "green investment bank," which could utilize established trust funds to leverage additional money through bond proposals. Regardless of which funding scheme(s) is eventually utilized, we believe it is imperative to channel such funds back into environmental infrastructure improvements, enforcement, border inspection, worker transition programs, certain farmer support programs, and funding of the NACE itself.

C. PUBLIC PARTICIPATION AND TRANSPARENCY

Public accountability of governing bodies is an essential element of environmental protection and democratic governance. Accountability includes the rights of notice, comment, the opportunity to participate, the ability to bring complaints, and access to decision-making processes. For the NAFTA package to address these serious concerns, the process of crafting this protocol must provide public accountability and the protocol itself must ensure accountability in the administration and implementation of the NAFTA package.

The current NAFTA dispute panel provisions completely fail to provide citizens from the NAFTA countries with the means to obtain information from, and participate in, resolution of trade disputes concerning environmental, conservation, health, and safety matters. The protocol must provide the public with participatory rights in whatever forum ultimately resolves trade/environment disputes under NAFTA. Furthermore, the NAFTA package must ensure that the public can participate meaningfully in the remaining negotiations of NAFTA. Prior NAFTA negotiations failed to provide the public with sufficient participatory rights, resulting in the deficiencies outlined in this letter. The upcoming negotiations of the NAFTA supplemental agreements provide an ideal opportunity to, at least in part, rectify NAFTA's failure to embrace democratic principles.

D. INTERNATIONAL AND DOMESTIC PRODUCTION/PROCESS (PPM) STANDARDS:

Trade law must recognize that how a product is produced is as important as the quality of the product itself. Only by recognizing process-based trade restrictions will governments retain their ability to keep high domestic standards without placing domestic producers at a competitive disadvantage. Although Article XX of the General Agreement on Tariffs and Trade (GATT) provides for health and natural resource conservation exceptions, these provisions have been constricted by recent GATT panel decisions. Without explicit clarification, NAFTA will repeat the mistake of GATT panels and the Dunkel draft by incorporating unacceptable provisions or interpretations of GATT (e.g., Article 103, NAFTA). For example, laws that would restrict the import of products made with CFCs, timber produced in an unsustainable fashion, or the inhumane treatment of animals could be subject to challenge under NAFTA.

The infamous tuna/dolphin dispute highlights the political difficulties that can be involved in a dispute concerning production process issues. In the tuna/dolphin case, a GATT panel held that harvesting methods were not a GATT-legitimate basis for distinguishing between, and placing import restrictions on, dolphin deadly tuna. After considerable political negotiation, Mexico agreed to join the U.S. in a global moratorium on the setting of nets on dolphin and to use the moratorium as a basis for prohibiting imports of dolphin deadly tuna. To date, Mexico and the U.S. have failed to enter into a global moratorium. The failure of such agreement to be effectively implemented serves to underscore the necessity for specific text within the context of the NAFTA package setting forth the right of NAFTA parties to set standards and distinguish between products on the basis of production methods. As part of the NAFTA package, we believe that relevant NAFTA parties should also be required to enter into and enact the global moratorium.

E. STANDARDS

A formal trading relationship between countries with significantly different environmental standards possesses predictable tensions. On the one hand, a country with high standards does not want its environmental quality or economic competitiveness to suffer as a result of weak (or non-existent) standards elsewhere. On the other hand, a country with lower standards does not want its sovereignty infringed upon by other countries. No NAFTA party's environmental, health, or safety standards should be weakened by NAFTA, and the NAFTA package should encourage, rather than inhibit, the ability of any NAFTA party to raise standards. See H.Cong.Res. 246 (Waxman-Gephardt); Trade Act of 1974, as amended, 19 U.S.C. Section 2504. In addition, the protocol must protect the full jurisdictional range of each party's domestic standard setting ability, such as proposals to prevent the export of domestically prohibited or restricted products (e.g., pesticides).

We believe the difficulty in reconciling differences in standards can be resolved in a manner consistent with the fundamental principles of international trade; namely, the test for environmental, conservation, health, and safety standards should be the same as for other NAFTA provisions -- national treatment and nondiscrimination. NAFTA's standards provisions must not provide a mechanism to challenge another country's chosen level of environmental, conservation, health, or safety protection, nor the means chosen to achieve such protection if the means is facially non-discriminatory in intent.

NAFTA's two chapters specifically covering standards, Sanitary and Phytosanitary standards (SPS) and Technical Barriers to Trade (TBT), contain ambiguous and contradictory language, and may be interpreted to encourage harmonization towards generally lower international norms. The current TBT and SPS texts set up numerous committees with broad policy jurisdiction, and establish detailed procedures for "conformity assessment" and other harmonization mechanisms. We believe that standard-setting is a matter for local, state, and national democratic bodies, and should be subject to trade disciplines only when there exists a discriminatory intent. To the extent that such committees and standard-setting procedures will exist in NAFTA, the SPS and TBT texts must be supplemented and clarified to ensure openness, mechanisms for public participation and oversight, and participation of environmental, health, and safety experts.

The protocol must also assure that the role of "science" as a necessary basis for standards-setting is not an absolute prerequisite to the adoption and implementation of standards. Standards based, for instance, on the precautionary principle or on consumer preference must be allowed, so long as their intent is transparent and facially non-discriminatory. Similarly, stan-

dards not based on risk assessment, like referendums and "zero-risk" standards, must not be challengeable by NAFTA. The NAFTA package must also make clear the ability of countries to maintain more than one level of acceptable risk. Further, the role of international standard-setting bodies must be only advisory.

In addition, the NAFTA standards sections threaten to expose legitimate environmental, conservation, health, and safety protections to attack as trade barriers on the basis of how a particular level of protection is implemented. The protocol, therefore, must clarify that a non-discriminatory measure will not be held to violate NAFTA because some less NAFTA-inconsistent measure may conceptually exist, a measure has extrajurisdictional implications, or is based on process distinctions.

Finally, the protections afforded by the wide range of standards applicable in the NAFTA parties can only be as strong as the commitment of the NAFTA countries to effectively monitor, inspect, and enforce these standards. For example, with the increased movement of products expected from NAFTA, the U.S. will need to implement new inspection mechanisms to ensure that meat and livestock imported from Mexico and Canada meet all applicable U.S. standards.

F. IMPACT ON STATE AND LOCAL LAWS:

Because states and localities are not parties to NAFTA, they cannot directly defend their standards under Chapter 7 or 9. Although the federal government is allowed to set standards it deems "appropriate," states and localities do not explicitly possess this right, and are thus dependent upon the federal government for defense. Furthermore, NAFTA Article 105 states all parties "shall ensure that all necessary measures are taken that in order to give effect to the provisions of this agreement ... by state and local governments." This situation will have a chilling effect upon progressive sub-federal legislation that often drives effective federal action. Thus, the NAFTA package must provide sub-federal governments standing and a major role in NAFTA disputes. It must also assure the ability of sub-federal governments to establish initiatives that exceed federal and international standards.

G. INVESTMENT:

Although Article 1114 of the existing NAFTA recognizes "that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures," it does nothing to actually prevent such an occurrence. No NAFTA country should become a "pollution haven" for unscrupulous investors, American or otherwise. The United States, for example, frequently applies limitations to investment, domestically and abroad, for important political and national security reasons; that definition must now

be broadened to include ecological security. The NAFTA package must provide a means, including for instance offsetting tariffs to make "polluters pay," so that environmental, health, and safety costs are fully internalized. Moreover, NAFTA's investment provisions should permit access to dispute settlement as a means of preventing environmentally damaging investment.

H. INTERNATIONAL AGREEMENTS:

At present, only three multilateral environmental agreements are given some limited measure of protection under NAFTA: CITES, the Montreal Protocol, and the Basel Convention. The Bush Administration's defense to this limitation was that only these three agreements possess direct trade implications. Not only is this assertion false, but the logic behind the argument is also needlessly narrow. We strongly believe that all NAFTA parties must possess the ability to implement and enforce any international agreement by imposing trade restrictions, if such restrictions are an effective way to secure complete compliance with the agreement in question. Therefore, we believe all present and future international environmental, health, safety, animal welfare or conservation agreements, to which any NAFTA party is a signatory, should be referenced in the protocol and added to Article 104.

I. ENERGY:

Rules of energy trade among NAFTA parties must respond to the pressing ecological imperative of global warming by assuring the stabilization of greenhouse gas emissions and the reduction of CO2 emissions. For both Canada and the U.S., substantial reductions of the energy intensity of these economies is also required. It is critical that the protocol make these goals explicit. As currently written, Chapter 6 of NAFTA and its precursor in the U.S.-Canadian FTA fundamentally undermine these objectives. Particularly problematic are those provisions of NAFTA that provide for proportional access, as well as the subsidization of oil and gas projects.

Thus, the protocol must secure the right of all NAFTA parties to restrict the export of energy and energy resources to abate global climate change and achieve other environmental objectives. The protocol must also protect least-cost energy programs, like subsidies to encourage conservation and renewables, from trade challenges. In addition, the protocol should include specific provisions to encourage the transfer of appropriate energy efficient technology and to ensure that full environmental impact assessments are undertaken for all major energy projects.

J. AGRICULTURE:

NAFTA, as written, threatens the survival of family farmers who have the most experience and potential to be good stewards of the land. If agricultural production is to be put on a sustainable footing, (e.g. decreased production on marginal land and the use of fewer chemicals), then environmental and social costs must be internalized. This will not happen if family farmers have to compete with cheaper imports produced in less sustainable ways.

NAFTA must preserve the capacity to employ supply management as a policy tool to promote sustainability. This capacity has been seriously undermined by NAFTA's tariffication of quantitative import controls, including Section 22 of the Agricultural Adjustment Act and the Meat Import Act. We therefore propose that the tariffication provision be altered through the supplemental agreement to allow for import controls on supply managed crops and to create the possibility for the future supply management of crops not currently in the program.

K. CONSERVATION ISSUES:

The NAFTA package must not allow or encourage natural resources such as water, forests, and the diversity of species to be unsustainably consumed or harmed. If countries are to develop and implement sustainable natural resource management programs, they must possess unfettered authority to regulate resource extraction. Of critical importance is the power to determine whether, and under what terms, a NAFTA party's resources may be exploited for export markets. Under NAFTA, particularly Articles 309 and 316, the sovereignty of countries to regulate the export of natural resources is severely curtailed. In fact, Article 316 goes much further than GATT by assuring perpetual access to other party's resources, notwithstanding domestic shortages, for as long as those resources last. A particularly serious problem in this regard is the prospect that NAFTA could be used to compel major interbasin transfers of water despite existing water management regimes. The protocol, thus, must explicitly provide that all parties possess unfettered authority to embargo natural resource exports for legitimate conservation ends.

A related problem centers upon the impact of NAFTA's intellectual property framework on efforts to protect the biological diversity of this continent's ecosystems. The protocol should ensure that equal protection be afforded to both the "stewards" or "owners" of biological resources, including indigenous and minority peoples, as well as to patent holders.

To help deal with wildlife habitat conservation in particular, we propose that the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere be revitalized and specifically linked to NAFTA so that acceding countries to

NAFTA make specific accommodations to habitat protection within their borders.

L. GOVERNMENT PROCUREMENT:

The use of preferential purchasing policies is an important tool that has been used by governments at all levels to create markets for, and encourage the development of, green technology and environmentally sound products. Under Chapter 10 of NAFTA, such green procurement initiatives are vulnerable to challenge. For instance, under the CUSFTA, Canadian paper manufacturers have argued they possess a trade claim on the basis of recycled paper content requirements by U.S. governments. Thus, the protocol must assure the rights of governments to implement environmental purchasing policies and practices free from the threat of trade sanctions.

M. THE "NECESSARY" TEST AND OTHER PROBLEMATIC NAFTA LANGUAGE:

Like many other NAFTA provisions, Chapter 21's environmental "exceptions" incorporate GATT terminology and jurisprudence. Unfortunately, recent GATT panel decisions have interpreted the term "necessary to protect human, animal or plant life or health" as requiring "necessary" measures to be "least-GATT" or "least-trade" restrictive. Under this standard, many present federal and state measures could be found to be NAFTA-inconsistent -- from bans on the trade in elephant ivory to state recycling programs. The environmental exceptions in NAFTA, therefore, need to be clarified and strengthened to ensure that the GATT jurisprudence does not affect the interpretation of NAFTA.

Also potentially problematic is NAFTA Article 903, which could be read to incorporate GATT provisions and jurisprudence in a way that diminishes a NAFTA country's ability to protect environmental resources. Furthermore, Annex 2004's allowance to seek dispute settlement if a party feels "any benefit it could reasonably have expected to accrue it ... is being nullified or impaired" invites attack upon U.S. standards. Similarly, the "based on" language of Articles 754, 755, 757, and 905 could needlessly threatens U.S. laws like the Delaney clauses. Here again, a clarifying standard should be adopted in the protocol that protects all U.S. environmental, health, and safety standards, as long as the, are not arbitrary, discriminatory, or disguised trade barriers.

N. SUSTAINABLE DEVELOPMENT:

While we laud the goal of "sustainable development" in NAFTA's preamble, we would like to see the goal of sustainable development made binding, and appear in Article 102's Objectives. By truly integrating the concept of sustainability into this

protocol, the NAFTA parties will establish an environmental benchmark for hemispheric trade and development.

III. THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT (NACE):

We support a NACE that will possess investigative, monitoring, and enforcement powers for all present and future parties of NAFTA, as well as serve as a mechanism for meaningful public participation. A strong NACE would not only enable the NAFTA parties to jointly increase the use and implementation of beneficial environmental, health, and safety measures, but also provide an effective mechanism for identifying and addressing degrading activities that create unfair competitive advantages or result in trade distortions. All activities of the NACE described will be public, except where explicitly provided otherwise.

STRUCTURE OF THE NACE:

Following are some practical recommendations regarding the structure and functions of the NACE.

1. NACE Commission:

The Commission should ultimately be responsible for all functions of the NACE. Each NAFTA party should have the right to appoint one NACE Commissioner who, together with the other NACE Commissioners, will possess authority to effectively implement NACE policies and perform NACE functions. We suggest that the operative voting norm for NACE be a majority. The U.S. NACE Commissioner, equipped with a staff, should be selected by the President with Senate confirmation.

2. NACE Secretariat:

A permanent and independent Secretariat should also be created in order to realize NACE's substantial mandate. Thus, we recommend establishing a head of the Secretariat (Secretary General). The Secretary General, with staff, should possess responsibility for implementing the environmental, health and safety provisions of the NAFTA package, though national courts would retain concurrent jurisdiction to enforce standards in their own courts. The Secretariat should also be responsible for submitting an annual public report to the parties on its various duties.

3. Roster of Dispute Panelists:

The Commission should establish a roster of environmental, conservation, health, and safety experts with appropriate trade background for dispute resolution under NACE.

4. NACE Public Advisory Committee:

We suggest a Public Advisory Committee be formed, made up of four representatives from each country and one representative selected by the Secretariat. The four U.S. representatives should be picked by the President, and must include at least two individuals from non-profit environmental, conservation, health, and safety groups.

FUNCTIONS OF THE NACE:

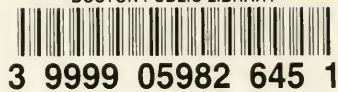
1. Dispute settlement:

An effective NACE must be empowered with the authority to engage in two distinct prongs of dispute resolution:

a. NACE must be able to effectively dismiss complaints that attack laws whose sole purpose is to advance legitimate environmental, health, safety, or conservation laws. The protocol should provide that challenges to laws implicating environmental, health, and safety protections should be referred to the NACE. Where the NACE finds that the sole purpose and effect of a challenged party's measure is to advance a legitimate environmental, health, or safety goal, such a finding shall be referred to the NAFTA dispute process for the dismissal of the complaint. Where the NACE finds that the complained of measure is not in full a legitimate environmental, health, or safety measure, the NAFTA dispute may continue, according to the findings of the NACE. Great deference in making its environmental, health, safety, or conservation determinations on the application of NAFTA's provisions. This process will ensure that legitimate protections are insulated from trade challenges, without compromising the ability of the parties to address NAFTA-inconsistent protectionist trade measures.

b. The NACE dispute settlement procedure should also be the mechanism for NAFTA environmental, health, and safety enforcement. Disputes may be brought by NAFTA parties or the public involving environmental, health, or safety issues before the Commission. The Commission should determine which cases shall be directly referred to a NACE dispute panel. In cases where the Commission declines a matter, the Public Advisory Committee should possess authority to compel the dispute resolution under NACE. The Public Advisory Committee should also possess authority to bring complaints to NACE directly. U.S. implementing legislation must specifically acknowledge the right of U.S. citizens and groups to sue in federal court to invoke trade measures or other appropriate sanctions for violation of U.S. standards. NACE should only enforce a party's own standards.

If a dispute panel verifies a complaint by a party or



individual, then that party or individual should be entitled to pursue the "snap-back" tariff provisions of NAFTA's Chapter 8 through the complainant's domestic trade agency. If a dispute panel determines that a party or individual has suffered an environmental, conservation, health, or safety injury as a result of lax enforcement in another country, yet no trade injury exists, then NACE should possess the authority to levy a fine upon the violating entity. Mechanisms should be developed to enable monies collected through the dispute process to be used for environmental compliance.

2. Investigation:

We believe the NACE must possess authority to investigate environmental, conservation, health, and safety matters in all NAFTA countries. The NACE should be able to commence an investigation on its own initiative or at the request of the Public Advisory Committee, the public, or a NAFTA party.

3. Monitoring:

The Secretariat, in cooperation with the NACE Commissioners, should also possess authority to monitor the condition of the NAFTA parties' general environment. Consequently, the Secretariat should possess the authority to obtain information from the NAFTA parties' government and the general public.

4. NAFTA Amendments and Accession:

Because of the significant impacts that either NAFTA amendments or accession would have upon the environment, the NACE Commission should make recommendations to the parties on these matters. Any new party to the NAFTA should be required to accede to the whole NAFTA package and submit a report to the NACE on its environmental, health, and safety protection schemes, as well as the enforcement of those protections. These reports could be revised by all NAFTA parties at regular intervals thereafter.

5. Cooperative efforts:

We further suggest the NACE promote cooperative efforts among NAFTA parties relating to trade and its environment, health, and safety implications for technology transfer, technical assistance, training, and education programs. Several successful cooperative ventures between NAFTA parties have already commenced. The potential in exporting U.S. technological expertise will not only enhance enforcement efforts in other countries, but will also generate a significant number of American jobs.

We appreciate the opportunity to brief you on these matters and look forward to working with you over the coming months and years. We hope that the protocol outlined in this letter is merely the beginning of a larger process to incorporate sound environmental oversight into the NAFTA process. Please do not hesitate to contact us if you have any questions.

On behalf of:

Defenders of Wildlife
 Center for International Environmental Law (CIEL)
 Friends of the Earth
 Sierra Club
 Public Citizen
 The Humane Society of the United States
 Humane Society International
 Institute for Agriculture and Trade Policy
 Center for Rural Affairs
 National Family Farm Coalition
 Earth Island Institute
 Marine Mammal Fund
 Animal Protection Institute
 Rainforest Action Network
 Whale and Dolphin Conservation Society
 Performing Animal Welfare Society (PAWS)
 The Fund for Animals
 Environmental Investigation Agency
 Environmental Solutions International
 International Primate Protection League
 N.Y. Public Interest Research Group, Inc.
 Community Nutrition Institute
 National Toxics Campaign Fund
 North America Project, World Policy Institute

cc: The Honorable Bruce Babbitt
 The Honorable Carol Browner
 The Honorable Mike Espy
 The Honorable Ron Brown
 The Honorable Warren Christopher
 The Honorable Tim Wirth
 The Honorable George Mitchell
 The Honorable Max Baucus
 The Honorable Daniel Moynihan
 The Honorable John Kerry
 The Honorable John Chafee
 The Honorable John Danforth
 The Honorable Sam Gibbons
 The Honorable Gerry Studds
 The Honorable Richard Gephardt
 The Honorable Dan Rostenkowski
 The Honorable Ron Wyden

The Honorable Bill Richardson
The Honorable Henry Waxman
The Honorable Sam Gejdenson
The Honorable Robert Matsui
The Honorable Peter DeFazio
The Honorable Cardiss Collins
The Honorable John LaFalce
The Honorable Laura Tyson
The Honorable Carmen Suro-Bredie
Ms. Kathleen McGinty

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